

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND

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IN RE: : Case No. 1:17-md-2804
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OPIATE LITIGATION :
: **VOLUME 28**
CASE TRACK THREE : JURY TRIAL
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: November 15, 2021
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TRANSCRIPT OF JURY TRIAL PROCEEDINGS

HELD BEFORE THE HONORABLE DAN AARON POLSTER

SENIOR UNITED STATES DISTRICT JUDGE

Official Court Reporter: Heather K. Newman, RMR, CRR
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
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08:40:03 1 (In court at 8:40 a.m.)

08:40:03 2 COURTROOM DEPUTY: All rise.

08:40:09 3 THE COURT: All right. Good morning.

08:40:11 4 Everyone can be seated.

08:40:12 5 First, I want to make sure that the exhibits have been
08:40:16 6 finalized.

08:40:17 7 Robert, you've been given what you need, and it's
08:40:20 8 finalized?

08:40:22 9 COURTROOM DEPUTY: Not yet. They're getting
08:40:25 10 them now.

08:40:26 11 THE COURT: Well. . .

08:40:32 12 What's the status of the exhibits, please? I want to
08:40:36 13 make sure that's been --

08:40:38 14 MS. FUMERTON: So, Your Honor, this is
08:40:39 15 Tara Fumerton for Walmart.

08:40:40 16 I believe, at least -- I have a thumb drive that I'm
08:40:43 17 actually currently handing -- that I can hand to Mr. Pitts.

08:40:47 18 THE COURT: All right. Is that -- everyone
08:40:48 19 has reviewed that thumb drive and it's fully accurate, is
08:40:52 20 that right, from the plaintiffs' standpoint?

08:40:54 21 MS. FUMERTON: These are the --

08:40:54 22 THE COURT: Please, from the plaintiffs'
08:40:56 23 standpoint, is that right?

08:41:02 24 MS. FITZPATRICK: Good morning, Your Honor.
08:41:04 25 Laura Fitzpatrick.

08:41:05 1 We have reviewed what is on the defendants' flash
08:41:08 2 drive and it looks correct. The plaintiffs would like to
08:41:10 3 check one more things on ours, just given some of the
08:41:13 4 redactions that CVS counsel has asked for just to triple
08:41:16 5 check, and then we'll provide the flash drive as soon as
08:41:19 6 that's done.

08:41:20 7 THE COURT: There are two flash drives? I'm
08:41:22 8 confused.

08:41:22 9 MS. FUMERTON: Yes, Your Honor.

08:41:24 10 COURTROOM DEPUTY: One from each side.

08:41:25 11 THE COURT: All right. Has the defendants
08:41:26 12 examined the plaintiffs' flash drive?

08:41:30 13 MR. SWANSON: Yes, Your Honor, we have.

08:41:31 14 THE COURT: All right. That's -- all right.

08:41:32 15 The other defendants have, Walmart's and Walgreens
08:41:36 16 have examined the plaintiffs' flash drive?

08:41:39 17 MR. SWANSON: Yes, Your Honor, for Walgreens.

08:41:41 18 MS. FUMERTON: Yes, Your Honor, for Walmart.

08:41:43 19 THE COURT: All right. Now, the defendants
08:41:44 20 have three flash drives or one?

08:41:47 21 MS. FUMERTON: One, Your Honor.

08:41:48 22 THE COURT: All right. And the plaintiffs
08:41:49 23 have to examine one more thing; is that right?

08:41:52 24 MS. FITZPATRICK: Yes, Your Honor. Only on
08:41:54 25 our flash drive. We just want to triple check three of the

08:41:58 1 documents.

08:41:58 2 THE COURT: You examined the defendants flash
08:42:00 3 drive, and is it fully accurate?

08:42:02 4 MS. FITZPATRICK: We -- Your Honor, yes.

08:42:03 5 THE COURT: All right. Then make sure that
08:42:05 6 both flash drives are given to Mr. Pitts.

08:42:08 7 All right. What are the issues on the slides?

08:42:13 8 MS. SWIFT: Your Honor, Kate Swift for
08:42:14 9 Walgreens.

08:42:15 10 We have one issue to raise with respect to the
08:42:17 11 plaintiffs' slides. There are a number of slides that
08:42:20 12 include on the face of the slides juror questions, which we
08:42:24 13 believe is improper. It's pandering, Your Honor.

08:42:29 14 MR. WEINBERGER: Your Honor, these -- there's
08:42:30 15 no effort to pander. These are -- these were --

08:42:33 16 THE COURT: Well --

08:42:34 17 MR. WEINBERGER: These were questions that
08:42:36 18 were on the ELMO that were part -- that are part of the
08:42:40 19 record.

08:42:40 20 THE COURT: Well, wait a minute. The
08:42:41 21 questions are not part of the record, Mr. Weinberger.

08:42:44 22 MR. WEINBERGER: Well, they were --

08:42:45 23 THE COURT: Well, they're not. So the
08:42:47 24 questions are not part of the record. The jurors --

08:42:49 25 MR. WEINBERGER: Well, they were part of the

08:42:50 1 transcript, Your Honor.

08:42:51 2 THE COURT: The jurors were told to disregard
08:42:53 3 all questions.

08:42:54 4 Are you playing -- I mean, are you playing an answer?
08:42:57 5 I don't understand. What is the purpose of putting a --
08:43:01 6 what is the purpose of putting any question on a slide?

08:43:05 7 MR. LANIER: Your Honor, the purpose for
08:43:07 8 putting the question on the slide is so that the jury can
08:43:10 9 see what they've already seen in court because they were all
08:43:12 10 placed on an overhead in court.

08:43:14 11 THE COURT: That's -- the question's not
08:43:16 12 evidence, all right.

08:43:18 13 MR. LANIER: No, Your Honor, but --

08:43:19 14 THE COURT: What is the purpose of a question
08:43:20 15 being on a slide?

08:43:21 16 MR. LANIER: The purpose of the question is so
08:43:22 17 that I can remind the jury that these were the issues and
08:43:26 18 the questions that were addressed within the framework of
08:43:29 19 the various witnesses and remind them what the testimony was
08:43:31 20 in regards to each of those questions.

08:43:34 21 MS. SWIFT: Your Honor, the questions do not
08:43:36 22 remind the jurors of what the testimony was.

08:43:37 23 THE COURT: Well --

08:43:41 24 MR. LANIER: It's something that they've
08:43:42 25 already seen.

08:43:43 1 THE COURT: No. All right. I will only
08:43:44 2 permit a question to be placed in -- on the screen,
08:43:51 3 whatever, if it is immediately followed by an answer that
08:43:55 4 was admissible.

08:43:56 5 MR. LANIER: Okay.

08:43:56 6 THE COURT: Then I'll permit that. But I'm
08:43:58 7 not going to permit a naked question --

08:44:00 8 MR. LANIER: Okay.

08:44:01 9 THE COURT: -- whether it's a lawyer's --

08:44:01 10 MR. WEINBERGER: It's not as if we're going to
08:44:03 11 give the answers.

08:44:04 12 THE COURT: I made it clear. Whether --
08:44:06 13 whether it's a lawyer question or a juror question, they're
08:44:09 14 not evidence. So if it's immediately followed by an
08:44:13 15 answer --

08:44:14 16 MR. LANIER: That makes sense, Your Honor.

08:44:15 17 THE COURT: -- I'll permit it.

08:44:16 18 MR. LANIER: We'll either do that or we'll
08:44:19 19 take them out.

08:44:20 20 That's fair.

08:44:20 21 THE COURT: All right.

08:44:21 22 Is that acceptable?

08:44:22 23 MS. SWIFT: Yes. Thanks very much,
08:44:23 24 Your Honor.

08:44:24 25 THE COURT: All right. So that's number --

08:44:26 1 that was Walgreens' issue.

08:44:38 2 Were there any other defense issues?

08:44:40 3 MS. FUMERTON: Your Honor, Tara Fumerton for
08:44:42 4 Walmart.

08:44:43 5 We have two slides that we continue to have an issue
08:44:45 6 with plaintiffs.

08:44:45 7 THE COURT: Well, let me see the slides,
08:44:48 8 please.

08:45:29 9 MS. FUMERTON: So, Your Honor, there's one
08:45:30 10 issue that goes across two slides, and then one of the
08:45:32 11 slides has another issue. So the first issue is this being
08:45:35 12 unaware of cases stating legal requirements.

08:45:38 13 First of all, it's not accurate as to what the
08:45:40 14 testimony was where both witnesses did have some familiarity
08:45:45 15 with the underlying cases. But as far as what the actual
08:45:48 16 legal requirements are, we think it's inappropriate to sort
08:45:51 17 of be, again, using these cases as suggesting what the legal
08:45:54 18 requirements are. So we object to that.

08:45:57 19 THE COURT: Well, there's a -- it's on a slide
08:46:01 20 with Ms. Hiland, unaware of cases stating legal
08:46:04 21 requirements, and with Nelson, unaware of *Holiday* case with
08:46:07 22 its legal requirements.

08:46:10 23 MS. FUMERTON: Yes, Your Honor. So that's the
08:46:13 24 same issue with both of those slides.

08:46:20 25 MR. LANIER: Your Honor, I think one of the

08:46:21 1 arguments that's being made by the defendants is that these
08:46:24 2 cases are not legal requirements. That's not the judge --
08:46:28 3 that's not the witness's decision, that's not the jury's
08:46:31 4 decision, that's your decision. But assuming that --

08:46:34 5 THE COURT: Well, I'm not advising the jury on
08:46:36 6 anything like this.

08:46:38 7 MR. LANIER: Agreed.

08:46:38 8 THE COURT: That's not something for them
08:46:40 9 to -- so that's not correct, Mr. Lanier. I'm not telling
08:46:42 10 the jury --

08:46:45 11 MR. WEINBERGER: But, Your Honor, so with
08:46:47 12 respect to Ms. Hiland.

08:46:48 13 THE COURT: The legal requirements there
08:46:50 14 were --

08:46:50 15 MR. WEINBERGER: With respect to Ms. Hiland,
08:46:52 16 she was asked about the *East Main* case, for example, and
08:46:55 17 whether she knew about it. And the case, as published in
08:46:58 18 the Federal Register as Demetra Ashley said is notice to the
08:47:03 19 defendants about certain standards that they have to apply
08:47:07 20 with respect to the CSA.

08:47:09 21 The *East Main* case a 2010 case that talked about red
08:47:13 22 flags, and she was asked about that and was not aware of it.

08:47:16 23 Similarly, Nelson was asked about the *Holiday* case --
08:47:20 24 obviously, it's been discussed a lot in this courtroom --
08:47:23 25 and he was not aware of those requirements. So it's the

08:47:27 1 standards published by the case as a result of enforcement
08:47:31 2 actions brought by the DEA, and these slides are a
08:47:38 3 reflection of, you know, witnesses who were involved in
08:47:41 4 regulatory compliance being unaware of them.

08:47:44 5 MS. FUMERTON: Well, and again, I disagree
08:47:46 6 with his characterization.

08:47:47 7 THE COURT: All right. I'm going to allow --
08:47:48 8 you can come back and say anything you want, Ms. Fumerton,
08:47:53 9 in your argument, that, you know, they weren't required to
08:47:56 10 do anything, the case didn't apply to Walmart, you know,
08:47:59 11 whatever -- you can say whatever you want. This is what
08:48:02 12 these witnesses said. Okay?

08:48:03 13 MS. FUMERTON: Respectfully, Your Honor, it's
08:48:06 14 not what the witnesses said. The witnesses said that, in
08:48:08 15 fact, Mr. Nelson had received it. There's two documents
08:48:10 16 they had admitted where there were legal -- the *Holiday* case
08:48:16 17 was, in fact, sent to Mr. Nelson and that's why they were
08:48:18 18 questioning him about it.

08:48:19 19 THE COURT: All right. I believe he said he
08:48:21 20 was unaware of really -- not familiar with the case and not
08:48:25 21 aware what, if anything, it said or whatever. What, if any,
08:48:32 22 guidance he was supposed to take from it. He was generally
08:48:34 23 not knowledgeable about it. Okay?

08:48:36 24 MS. FUMERTON: Well, again, I disagree.

08:48:37 25 MR. WEINBERGER: Well, then you can argue

08:48:39 1 that.

08:48:39 2 THE COURT: Then argue it, that it doesn't
08:48:41 3 matter. Okay?

08:48:41 4 MS. FUMERTON: But I also think it's
08:48:44 5 inconsistent with, again, when we are now saying what the
08:48:46 6 legal requirements are. Now with a question you're going to
08:48:48 7 essentially having Mr. Lanier arguing that these cases
08:48:50 8 somehow have certain legal requirements and legal --
08:48:57 9 essentially effect with respect to these issues in this
08:48:59 10 case, and it's inappropriate for Mr. Lanier to be
08:49:01 11 instructing the jury as to what is the law. That's
08:49:04 12 something this Court should do.

08:49:05 13 THE COURT: All right. I've got a problem
08:49:06 14 with legal requirements. Just cross out legal requirements.
08:49:06 15 All right?

08:49:12 16 MR. LANIER: How about if I -- who's unaware
08:49:13 17 of the *Holiday* case. Nelson was generally unaware of the
08:49:16 18 *Holiday* case. All right? And Ms. Hiland was generally
08:49:20 19 unaware of cases. I mean, she may have heard it, but she
08:49:23 20 was unaware of what they said or any import from it. So you
08:49:28 21 can -- so it's the legal requirements, because it's not
08:49:34 22 clear that the case imposed any legal requirement on anyone
08:49:36 23 in this case. All right? It was not directed there. So
08:49:40 24 just cross out legal requirements.

08:49:42 25 MS. FUMERTON: Thank you, Your Honor.

08:49:42 1 And then just one last thing on the Mr. Nelson slide.
08:49:46 2 The last bullet point said, "Emphasize sales over complying
08:49:50 3 with the 2011 MOA requirements." The MOA came in for a
08:49:54 4 limited purpose with respect to notice. It also does not
08:49:56 5 actually have any sort of requirements relating to what --
08:50:02 6 they're purporting as -- these analyzing the argument --

08:50:03 7 THE COURT: Well, this is argument. You can
08:50:05 8 respond to the -- you know, you can respond any way you
08:50:10 9 want. I'm not going to change that.

08:50:12 10 MS. FUMERTON: Thank you, Your Honor.

08:50:14 11 MR. LANIER: So, Your Honor, to make sure I've
08:50:16 12 done this in a way that is right by your ruling, what I did
08:50:21 13 on Mr. Nelson is I -- or, yeah, let me make sure I've got it
08:50:28 14 right.

08:50:28 15 THE COURT: Just say unaware of *Holiday* case.

08:50:30 16 MR. LANIER: Yeah, I put unaware of the
08:50:32 17 *Holiday* case for Mr. Nelson, and for Ms. Hiland, instead of
08:50:36 18 just unaware of cases, what I did for her is said unaware of
08:50:44 19 the -- oh, crud. Here it is. "Unaware of cases stating
08:50:51 20 standards."

08:50:53 21 Can I do that?

08:50:54 22 MS. FUMERTON: No. Your Honor, I think that's
08:50:56 23 the same objection we would have.

08:50:57 24 MR. LANIER: Well, it's not legal
08:50:59 25 requirements. These are certainly at least standards.

08:51:01 1 MS. FUMERTON: Well, standard --

08:51:02 2 THE COURT: Well, the problem is, unaware of
08:51:04 3 cases doesn't -- I don't know --

08:51:06 4 MR. LANIER: That doesn't mean anything.

08:51:07 5 THE COURT: -- if it means anything. Put a --
08:51:09 6 you know, put the name of the case, the one that involved
08:51:11 7 Walmart. All right?

08:51:13 8 MS. FUMERTON: Well, that's part of the
08:51:14 9 problem, Your Honor, is none of these involved Walmart.

08:51:17 10 MR. LANIER: Well, they all apply to Walmart
08:51:20 11 in the sense that these are --

08:51:22 12 THE COURT: Well, put she's unaware of
08:51:24 13 *Holiday*. Okay? Unaware of the *Holiday* case.

08:51:25 14 MS. FUMERTON: She actually testified -- and
08:51:26 15 Mr. Lanier has this testimony in front of him, but the --
08:51:28 16 she actually testified she was aware of *Holiday* and read it.
08:51:31 17 Specifically, I think Mr. Weinberger was talking about the
08:51:33 18 *East Main* case.

08:51:35 19 MR. LANIER: *East Main* and others.

08:51:36 20 MS. FUMERTON: If he wants to put she's
08:51:38 21 unaware of *East Main*, I think that's fine.

08:51:40 22 THE COURT: All right. Put unaware of *East*
08:51:42 23 *Main* case.

08:51:42 24 MR. LANIER: All right. Or I could -- yeah.
08:51:46 25 I think it wasn't just *East Main* case, it was others as

08:51:49 1 well.

08:51:49 2 How about, "Unaware of DEA notice cases"?

08:51:51 3 MS. FUMERTON: No, Your Honor.

08:51:52 4 THE COURT: I don't know what that means.

08:51:53 5 MR. LANIER: Okay.

08:51:53 6 THE COURT: All right? If you want to refer
08:51:55 7 to a -- she was unaware of the *East Main* case. If there was
08:51:58 8 another specific case you asked her about --

08:52:00 9 MR. LANIER: Then I'll just say it in
08:52:02 10 argument. I'll make the change on the slide. Because I
08:52:04 11 said, I assume you've read the *East Main Ohio Pharmacy* case?
08:52:08 12 She said, I'm not sure.

08:52:09 13 Are you familiar with the *Town Wood Pharmacy* case?

08:52:11 14 I don't know that I'm familiar with that.

08:52:12 15 You know, it was -- those were the questions. But
08:52:15 16 I'll just say, "Unaware of *East Main* case," and then I'll
08:52:19 17 mention the others, but I won't have it on the slide.

08:52:22 18 THE COURT: All right. Okay. Were there any
08:52:28 19 other objections to the plaintiffs' slides?

08:52:33 20 MR. HYNES: Your Honor, CVS and the plaintiffs
08:52:36 21 worked out our objections, so there's nothing to raise with
08:52:39 22 you.

08:52:39 23 THE COURT: All right. Fine.

08:52:41 24 And I take it there weren't any objections from the
08:52:43 25 plaintiffs' side to any of the defendants' slides?

08:52:46 1 MR. LANIER: Oh, there were, Your Honor, but,
08:52:48 2 I mean, my view of the world is, this is fair argument, and
08:52:51 3 so --

08:52:51 4 THE COURT: Okay.

08:52:52 5 MR. LANIER: -- I'm not going to make the
08:52:54 6 objections to theirs that they make to mine because I think
08:52:57 7 that that's -- you know, I mean, look, they'll do a slide
08:53:01 8 like this (indicating), what plaintiffs needed to prove, and
08:53:04 9 they're going to recast the law. Okay? I mean, that's
08:53:08 10 their argument. I think that it's a legal argument that
08:53:12 11 they're making, and they're putting themselves in the
08:53:14 12 position of saying what the law is, but my view is, if I'm a
08:53:17 13 lawyer, I ought to be able to handle it, so I'll just --

08:53:20 14 THE COURT: Fine. Right. If you think
08:53:22 15 they're misstating the instructions, then you can respond
08:53:26 16 to. If I think they are, I won't let them say that.

08:53:29 17 MR. LANIER: Okay. That's good enough for me,
08:53:31 18 Your Honor. Thank you.

08:53:31 19 THE COURT: So both sides better be careful if
08:53:34 20 you're saying what the -- you know, what specifically the
08:53:36 21 plaintiffs have to prove, that it's tied to the
08:53:38 22 instructions, because if not, I'll -- I'll have to
08:53:42 23 interrupt.

08:53:42 24 MR. LANIER: I'm more than happy with that
08:53:45 25 understanding, and I will bide my time and my tongue.

Charge to the Jury

08:53:53 1 THE COURT: I mean, the whole point of my
08:53:55 2 providing the instructions in advance and reading them is so
08:53:58 3 that everyone knows that.

08:53:59 4 MR. LANIER: Um-hmm.

08:54:04 5 THE COURT: So, again, it's my intention to
08:54:06 6 read the final instructions, pages 1 through 27, and then
08:54:11 7 stop, and then we'll have Mr. Lanier's opening -- closing.

08:55:03 8 SPECIAL MASTER COHEN: Just a reminder,
08:55:04 9 please, everybody silence your phones and devices.

08:55:11 10 THE COURT: So I guess we have one empty chair
08:55:13 11 for Mr. Handly and one for Professor McGovern just in honor
08:55:20 12 of both of their contributions to the MDL, and it's very
08:55:28 13 appropriate.

08:57:40 14 (Brief pause in proceedings).

08:58:45 15 THE COURT: Okay. You can bring in the jury.

09:02:44 16 (Brief pause in proceedings.)

09:06:35 17 (Jury returned to courtroom.)

09:07:10 18 CHARGE TO THE JURY

09:07:10 19 THE COURT: Okay. Please be seated, ladies
09:07:12 20 and gentlemen.

09:07:16 21 All right. Good morning, ladies and gentlemen. I
09:07:18 22 hope you all had a good weekend.

09:07:22 23 I'm going to begin this morning by reading most of my
09:07:29 24 final instructions, Pages 1 to 27. I have given each of you
09:07:36 25 a copy. If you wish to follow along while I read, you may,

Charge to the Jury

09:07:40 1 but, of course, you don't have to. Each of you will have a
09:07:42 2 copy of the final instructions for using -- for use in your
09:07:51 3 deliberations.

09:07:51 4 Members of the jury, you have heard all of the
09:07:53 5 evidence, and it's now time for me to instruct you about the
09:07:55 6 law that you must follow in deciding this case.

09:07:58 7 I will start by explaining your duties and the general
09:08:01 8 rules that apply in every civil case.

09:08:03 9 Then I will explain the elements or parts of the
09:08:08 10 claims that the plaintiffs assert against the defendants.
09:08:11 11 As I have explained before, there are two plaintiffs in this
09:08:14 12 case: Lake County, Ohio, and Trumbull County, Ohio.
09:08:20 13 Further, there are three defendants in this case: Walgreens
09:08:23 14 Company; CVS Pharmacy, Inc., and Walmart Inc.

09:08:30 15 After I explain the elements of the claims that the
09:08:32 16 two plaintiffs assert against the three defendants, the
09:08:35 17 lawyers will present their closing arguments.

09:08:36 18 Following closing arguments, I will explain the rules
09:08:40 19 that you must follow during your deliberations in the jury
09:08:43 20 room and the interrogatories and verdicts that you may
09:08:46 21 return.

09:08:47 22 Please listen very carefully to everything that I say.

09:08:55 23 It is your duty as jurors to follow the law as stated
09:08:58 24 in the instructions of the Court and to apply the rules of
09:09:00 25 law so given to the facts as you find them from the evidence

Charge to the Jury

09:09:03 1 in the case.

09:09:04 2 You have two main duties as jurors: The first one is
09:09:08 3 to decide what the facts are from the evidence that you saw
09:09:12 4 and heard here in court. Deciding what the facts are is
09:09:16 5 your job, not mine, and nothing I have said or done during
09:09:19 6 this trial was meant to influence your decision about the
09:09:23 7 facts in any way.

09:09:24 8 Your second duty is to take the law that I give you,
09:09:28 9 apply it to the facts, and decide if each plaintiff has
09:09:32 10 proven by a preponderance of the evidence that each
09:09:36 11 defendant is liable. It is my job to instruct you about the
09:09:39 12 law, and you are bound by the oath you took at the beginning
09:09:43 13 of the trial to follow the instructions that I give you,
09:09:46 14 even if you personally disagree with them. This includes
09:09:50 15 the instructions that I gave you during the trial and these
09:09:53 16 instructions. All the instructions are important, and you
09:09:56 17 should consider them together as a whole.

09:09:58 18 The lawyers will talk about the law during their
09:10:03 19 arguments. But if what they say is different from what I
09:10:05 20 say, you must follow what I say. What I say about the law
09:10:09 21 controls.

09:10:09 22 Perform these duties fairly. Do not let any bias,
09:10:14 23 sympathy, or prejudice that you may feel toward one side or
09:10:18 24 the other influence your decision in any way.

09:10:20 25 All parties are equal in the eyes of the law.

Charge to the Jury

09:10:24 1 Corporations stand on equal footing, and size is not to be
09:10:28 2 considered. Both the parties and the public expect that you
09:10:31 3 will carefully and impartially consider all of the evidence
09:10:34 4 in the case, follow the law as stated by the Court, and
09:10:38 5 reach a just decision regardless of the consequences.

09:10:41 6 In a civil action like this one, plaintiffs are
09:10:48 7 required to prove all the elements of their claim by a
09:10:50 8 preponderance of the evidence. This duty is known as the
09:10:55 9 burden of proof. To establish something by the
09:11:00 10 preponderance of the evidence, or by a preponderance of the
09:11:02 11 evidence, means to prove that something is more likely true
09:11:05 12 than not true.

09:11:05 13 A preponderance of the evidence is the greater weight
09:11:08 14 of the evidence; that is, evidence that you believe because
09:11:12 15 it outweighs or overbalances in your mind the evidence
09:11:15 16 opposed to it. A preponderance means evidence that is more
09:11:19 17 probable, more persuasive, more likely, or of greater
09:11:23 18 probative value. Remember, it is the quality of the
09:11:26 19 evidence that must be weighed, not the quantity of evidence.

09:11:29 20 This standard does not require proof to an absolute
09:11:34 21 certainty, since proof to an absolute certainty is seldom
09:11:39 22 possible in any case.

09:11:40 23 You may also have heard of the term "proof beyond a
09:11:44 24 reasonable doubt." That is a stricter standard of proof
09:11:46 25 that applies in criminal cases only. It does not apply in

Charge to the Jury

09:11:49 1 civil cases like this one. You should, therefore, put it
09:11:52 2 out of your minds.

09:11:53 3 In determining whether any fact in issue has been
09:11:57 4 proved by a preponderance of the evidence you may, unless
09:12:00 5 otherwise instructed, consider the testimony of all
09:12:03 6 witnesses, regardless of who may have called them, and all
09:12:07 7 exhibits received in evidence, regardless of who may have
09:12:10 8 produced them.

09:12:11 9 If the weight of the evidence is equally balanced, or
09:12:15 10 if you are unable to determine which side of an issue has
09:12:17 11 the preponderance, then the party who has the burden of
09:12:21 12 proof has not established that issue by a preponderance of
09:12:24 13 the evidence.

09:12:25 14 You must make your decision based only on the evidence
09:12:30 15 that you saw and heard here in court. Do not let rumors,
09:12:34 16 suspicions, or anything else that you may have even or heard
09:12:39 17 outside of court influence your decision in any way.

09:12:41 18 Evidence is all the testimony received from the
09:12:45 19 witnesses including depositions, the exhibits admitted
09:12:48 20 during the trial, the stipulations that the lawyers agreed
09:12:50 21 to, and any facts which the Court requires you to accept as
09:12:54 22 true.

09:12:54 23 Nothing else is evidence. The lawyers' statements and
09:12:58 24 arguments are not evidence. If you remember the facts
09:13:01 25 differently from the way the attorneys have stated them, you

Charge to the Jury

09:13:04 1 should base your decision on what you remember. The
09:13:07 2 lawyers' questions and objections are not evidence. My
09:13:10 3 legal rulings are not evidence, and my comments and
09:13:15 4 questions are not evidence.

09:13:15 5 During the trial I may have not let you hear the
09:13:18 6 answers to some of the questions that the lawyers asked.
09:13:21 7 And I may have ordered you to disregard things you saw or
09:13:24 8 heard, or I struck things from the record. You must
09:13:28 9 completely ignore all these things. Do not even think about
09:13:32 10 them. Do not speculate about what a witness might have
09:13:35 11 said. You may not draw any inference from an unanswered
09:13:39 12 question, nor may you consider testimony which has been
09:13:42 13 stricken in reaching your decision. Make your decision
09:13:45 14 based only on the evidence, as I have defined it here and
09:13:48 15 nothing else.

09:13:51 16 You should use your common sense in weighing the
09:13:53 17 evidence. Consider it in light of your everyday experience
09:13:57 18 with people and events and give it whatever weight you
09:14:00 19 believe it deserves. If your experience tells you that
09:14:03 20 certain evidence reasonably leads to a conclusion, you are
09:14:06 21 free to reach that conclusion.

09:14:10 22 Now, some of you may have heard the terms "direct
09:14:13 23 evidence" and "circumstantial evidence."

09:14:15 24 Direct evidence is evidence like the testimony of an
09:14:17 25 eyewitness that, if you believe it, directly proves a fact.

Charge to the Jury

09:14:21 1 If a witness testifies that he saw it raining outside, and
09:14:25 2 you believe him, that would be direct evidence that it was
09:14:27 3 raining.

09:14:28 4 Circumstantial evidence is a chain of circumstances
09:14:30 5 that indirectly proves a fact. If someone walks into the
09:14:34 6 courtroom wearing a raincoat covered with drops of water and
09:14:37 7 carrying a wet umbrella, that would be circumstantial
09:14:41 8 evidence from which you could conclude that it was raining.

09:14:44 9 It is your job to decide how much weight to give the
09:14:48 10 direct and circumstantial evidence. The law makes no
09:14:51 11 distinction between the weight that you should give to
09:14:54 12 either one; the law does not say that one is better evidence
09:14:57 13 than the other. You should consider all the evidence, both
09:15:00 14 direct and circumstantial, and give it whatever weight you
09:15:03 15 believe it deserves.

09:15:04 16 The law permits you to draw reasonable inferences from
09:15:10 17 the evidence that has been presented. Inferences are
09:15:12 18 deductions or conclusions, which reason and common sense
09:15:14 19 lead the jury to draw from facts which have been established
09:15:18 20 by the evidence in the case.

09:15:20 21 In other words, while you should consider only the
09:15:23 22 evidence in the case, you are not limited solely to what you
09:15:26 23 see and hear as the witnesses testify. You are permitted to
09:15:30 24 draw from facts which you have -- which you find have been
09:15:34 25 proved reasonable inferences that you feel are justified in

Charge to the Jury

09:15:39 1 light of your common experience.

09:15:40 2 Another part of your job as jurors is to decide how
09:15:46 3 credible, or believable, each witness was. This is your
09:15:49 4 job, not mine. It is up to you to decide if a witness's
09:15:55 5 testimony was believable and how much weight you think it
09:15:57 6 deserves. You are free to believe everything that a witness
09:16:00 7 said, or only part of it, or none of it at all. But you
09:16:03 8 should act reasonably and carefully in making these
09:16:05 9 decisions.

09:16:05 10 Let me suggest some things for you to consider in
09:16:11 11 evaluating each witness's testimony.

09:16:12 12 First, ask yourself if the witness was able to clearly
09:16:19 13 see or hear the events. Sometimes even an honest witness
09:16:22 14 may not have been able to see or hear what was happening and
09:16:25 15 may make a mistake.

09:16:26 16 Ask yourself how good the witness's memory seemed to
09:16:29 17 be. Did the witness seem able to accurately remember what
09:16:32 18 happened?

09:16:33 19 Ask yourself if there was anything else that may have
09:16:36 20 interfered with the witness's ability to perceive or
09:16:38 21 remember the events.

09:16:39 22 Ask yourself how the witness acted while testifying.
09:16:44 23 Did the witness appear honest? Or did the witness appear to
09:16:47 24 be lying?

09:16:47 25 Ask yourself if the witness had any relationship to

Charge to the Jury

09:16:51 1 plaintiffs or defendants or anything to gain or lose from
09:16:54 2 the case that might influence the witness's testimony.

09:16:58 3 Ask yourself if the witness had any bias, prejudice,
09:17:01 4 or reason for testifying, that might cause the witness to
09:17:05 5 lie or to slant the testimony in favor of one side or the
09:17:08 6 other.

09:17:08 7 Ask yourself if the witness testified inconsistently
09:17:13 8 while on the witness stand, if the witness said or did
09:17:16 9 something, or failed to say or do something at any other
09:17:20 10 time that is inconsistent with what the witness said while
09:17:26 11 testifying.

09:17:26 12 If you believe that the witness was inconsistent, ask
09:17:29 13 yourself if this makes the witness's testimony less
09:17:31 14 believable. Sometimes it may; other times it may not.
09:17:35 15 Consider whether the inconsistency was about something
09:17:39 16 important, or about some unimportant detail.

09:17:41 17 Ask yourself if it seemed like an innocent mistake or
09:17:45 18 if it seemed deliberate.

09:17:46 19 Ask yourself how believable the witness's testimony
09:17:49 20 was in light of all the other evidence. Was the witness's
09:17:52 21 testimony supported or contradicted by other evidence that
09:17:56 22 you found believable? If you believe that a witness's
09:17:59 23 testimony was contradicted by other evidence, remember that
09:18:02 24 people sometimes forget things. Even two honest people who
09:18:06 25 witness the same event may not describe it exactly the same

Charge to the Jury

09:18:09 1 way.

09:18:10 2 These are only some of the things that you may
09:18:12 3 consider in deciding how believable each witness was. You
09:18:16 4 may also consider other things that you think shed some
09:18:19 5 light on the witness's believability. Use your common sense
09:18:22 6 and your everyday experience in dealing with other people,
09:18:26 7 and then decide what testimony you believe and how much
09:18:30 8 weight you think it deserves.

09:18:31 9 Opinion testimony.

09:18:34 10 You've heard the testimony of numerous individuals,
09:18:38 11 sometimes referred to as expert witnesses, who offered their
09:18:42 12 professional opinions about the matters at issue in this
09:18:44 13 lawsuit. You do not have to accept their opinions. In
09:18:48 14 deciding how much weight to give each opinion, you should
09:18:51 15 consider the witness's qualifications and how they reached
09:18:55 16 their conclusions.

09:18:56 17 Also, consider the other factors discussed in these
09:19:00 18 instructions for weighing the credibility of witnesses.

09:19:03 19 If you decide that the opinion of an expert witness is
09:19:07 20 not based upon sufficient education and experience, or if
09:19:11 21 you conclude that the reasons given in support of the
09:19:13 22 opinion are not sound, or if you feel that an expert
09:19:16 23 witness's opinion is outweighed by other evidence, you may
09:19:20 24 disregard the opinion entirely.

09:19:21 25 Remember that you alone decide how much of a witness's

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testimony to believe, and how much weight it deserves.

One more thing about witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference. Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by books, records, and other documents that are in evidence in this case.

However, these charts or summaries are not, in and of themselves, evidence or proof of the facts. If the charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

There is one more general subject that I want to talk take you about before I begin explaining the elements of the claims. The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the Rules of Evidence. Those rules are designed to make sure that both sides receive a fair trial.

And do not interpret my rulings on their objections as any indication of how I think I --- of how I think the case

Charge to the Jury

09:20:49 1 should be decided. My rulings were based on the Rules of
09:20:54 2 Evidence, not on how I feel about the case. Remember that
09:20:56 3 your decision must be based only on the evidence that you
09:20:59 4 saw and heard here in court.

09:21:01 5 That concludes the part of my instructions explaining
09:21:08 6 your duties and the general rules that apply in every civil
09:21:10 7 case. In a moment, I will explain the elements of
09:21:13 8 plaintiffs' claims. But before I do that, I want to mention
09:21:16 9 the following:

09:21:18 10 Each of the defendants are corporations. Corporations
09:21:22 11 can be held liable for their acts or omissions, just as you
09:21:25 12 or I can. As corporations, they can act, or fail to act,
09:21:29 13 only through their officers and employees. The conduct of
09:21:33 14 an officer or employee acting within the scope of his or her
09:21:37 15 employment should be treated as the conduct of the
09:21:40 16 corporation.

09:21:41 17 During my summary of the plaintiffs' claims, I will
09:21:45 18 often use the word "person" or "persons." Please bear in
09:21:48 19 mind that for all of these claims, corporations are
09:21:50 20 considered persons. Each person, including each
09:21:53 21 corporation, is considered a separate person under the law
09:21:58 22 whose liability must be separately determined.

09:22:00 23 I will now instruct you on the elements of plaintiffs'
09:22:07 24 public nuisance claims.

09:22:07 25 Each plaintiff alleges that each defendant dispensed

Charge to the Jury

opioid products in a manner that endangered public health or safety, thereby creating a public nuisance. Specifically, each plaintiff claims that each defendant substantially contributed to an oversupply of legal prescription opioids and to diversion of those opioids into the illicit market outside of appropriate medical channels, thereby endangering public health or safety.

Let me define for you the legal term "public nuisance." A public nuisance is an unreasonable interference with a right held by the public in common that is ongoing today. A public nuisance includes an unreasonable interference with public health or public safety.

A right common to the general public is a right or an interest that belongs to the community at large. It is a right that is collective in nature. A public right is different from an individual right that everyone has, like the right not to be assaulted or defrauded.

For a defendant to be held liable for creating a public nuisance, a plaintiff must show, by the greater weight of the evidence, that the defendant did one or both of the following two things:

First, the defendant engaged in intentional conduct that caused a significant and ongoing interference with a public right to health or safety;

Or two, the defendant engaged in unlawful conduct that

Charge to the Jury

09:23:36 1 caused a significant and ongoing interference with a public
09:23:40 2 right to health or safety.

09:23:42 3 Please remember that you are being asked to determine
09:23:45 4 only whether one or more of the defendants created a public
09:23:50 5 nuisance. You are not being asked to determine whether
09:23:52 6 there should be a remedy for this claim, or what that remedy
09:23:59 7 should be. If you find that one or more of the defendants
09:24:01 8 created a public nuisance, the Court will determine the
09:24:03 9 remedy.

09:24:07 10 Now, let me define some of the terms I just used. One
09:24:10 11 of those terms is "intentional conduct."

09:24:13 12 Intentional conduct occurs when a person acts with the
09:24:17 13 purpose to produce a specific result. A person intends an
09:24:21 14 act when that act is done purposely, not accidentally. The
09:24:26 15 intent with which a person acts is known only to that
09:24:29 16 person.

09:24:30 17 There are two ways to prove a person's intentional
09:24:33 18 conduct. One, when a person expresses their intent to
09:24:36 19 others. Or two, when a person somehow indicates their
09:24:39 20 intent by their conduct.

09:24:40 21 For you to find that a person engaged in intentional
09:24:44 22 conduct, it is enough that the person intended to act and
09:24:47 23 knew, or was substantially certain, that the circumstances
09:24:51 24 resulting from that act would interfere with public health
09:24:54 25 or public safety. It is not necessary for you to find that

Charge to the Jury

09:24:58 1 the person intended to cause a public nuisance.

09:25:00 2 If a person learns that circumstances resulting from
09:25:05 3 their conduct interfere with public health or public safety,
09:25:09 4 and the person continues that conduct, then the subsequent
09:25:13 5 conduct is intentional.

09:25:16 6 Settlement agreements.

09:25:18 7 You have heard testimony about settlements that
09:25:21 8 certain defendants entered into with the DEA, the Drug
09:25:26 9 Enforcement Administration. This settlement evidence has
09:25:28 10 been admitted for a limited purpose. You may consider these
09:25:32 11 settlements only to the extent you believe they bear on what
09:25:36 12 notice or knowledge the defendant received as a result of
09:25:39 13 the settlements, or to the extent you believe they bear on
09:25:43 14 the defendants' intent. You may not infer liability or draw
09:25:46 15 any conclusions about a defendant's potential liability in
09:25:50 16 this case based upon the fact that it entered into those
09:25:54 17 settlements.

09:25:55 18 Employee conversations.

09:25:58 19 You have heard testimony from one or more of the
09:26:01 20 defendants' employees about conversations they testified
09:26:05 21 they had with officials from State Boards of Pharmacy. This
09:26:10 22 evidence has been admitted for a limited purpose. You may
09:26:13 23 consider their recollections of those conversations as
09:26:18 24 evidence of the defendants' own knowledge or intent. You
09:26:21 25 may not consider the testimony as evidence of any official

Charge to the Jury

09:26:24 1 policy of any Board of Pharmacy.

09:26:26 2 Now, let me define the term "unlawful conduct."

09:26:33 3 Unlawful conduct can occur either by acting in a
09:26:37 4 certain way that is prohibited by law, or by failing to act
09:26:41 5 in a certain way that is required by law. Specifically,
09:26:45 6 unlawful conduct occurs when a person engages in conduct
09:26:49 7 that is prohibited by a statute, ordinance, or regulation
09:26:53 8 that controls safety. And unlawful conduct also occurs when
09:26:57 9 a statute, ordinance, or regulation that controls safety
09:27:01 10 requires a person to engage in certain conduct, but the
09:27:05 11 person fails to do so.

09:27:07 12 The person does not need to know their conduct is
09:27:10 13 unlawful for an unlawful act to occur.

09:27:12 14 A law controls safety if it imposes specific legal
09:27:17 15 requirements for the protection of the health, safety, or
09:27:20 16 welfare of others. The Federal and Ohio Controlled
09:27:25 17 Substances Acts and their accompanying regulations are laws
09:27:27 18 that control safety.

09:27:28 19 Conduct that is fully authorized by a statute,
09:27:32 20 ordinance, or regulation cannot create a public nuisance
09:27:36 21 because it is lawful conduct. But if a person's conduct
09:27:39 22 does not comply with what is authorized by law, then that
09:27:42 23 conduct may be unlawful conduct.

09:27:44 24 Plaintiffs contend each defendant's conduct with
09:27:48 25 respect to their dispensing of controlled substances did not

Charge to the Jury

09:27:53 1 comply with the Federal and Ohio Controlled Substances Acts
09:27:57 2 and their accompanying regulations. Prescription opioids
09:28:01 3 are controlled substances within the meaning of Federal and
09:28:04 4 Ohio law and regulations.

09:28:05 5 The Federal and Ohio Controlled Substances Acts and
09:28:10 6 their accompanying regulations do not require strict or
09:28:13 7 perfect compliance. Only substantial compliance is
09:28:16 8 required. In other words, not every act that is in
09:28:20 9 violation of the law can be a public nuisance. Only
09:28:23 10 unlawful conduct that causes a significant interference with
09:28:27 11 a public right to health or safety can be a public nuisance.

09:28:34 12 Under both Federal and Ohio laws and regulations,
09:28:38 13 entities that are authorized to dispense controlled
09:28:40 14 substances are required to provide effective controls and
09:28:43 15 procedures to guard against theft and diversion.

09:28:46 16 A prescription for a controlled substance must be
09:28:49 17 issued for a legitimate medical purpose by a doctor, or
09:28:53 18 other registered prescriber, acting in the usual course of
09:28:57 19 his or her professional practice. The Federal and Ohio
09:29:02 20 Controlled Substances Acts and their accompanying
09:29:05 21 regulations also provide that the pharmacist who fills the
09:29:09 22 prescription has a corresponding responsibility for proper
09:29:14 23 dispensing of controlled substances for a legitimate medical
09:29:16 24 purpose. The corresponding responsibility for proper
09:29:20 25 dispensing of valid prescription extends to the pharmacy

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09:29:24 1 itself.

09:29:25 2 A violation of the corresponding responsibility occurs
09:29:29 3 when a person knowingly fills or allows to be filled an
09:29:33 4 illegitimate prescription. In this context, knowingly
09:29:38 5 includes when a person acts with deliberate ignorance or
09:29:43 6 willful blindness to information in their possession.

09:29:46 7 Public nuisance-causation.

09:29:51 8 Under either of the two ways of proving public
09:29:55 9 nuisance; that is, showing intentional conduct or unlawful
09:29:58 10 conduct, a plaintiff must prove by the greater weight of the
09:30:02 11 evidence that a defendant's conduct caused an interference
09:30:05 12 with a right to public health or safety that is ongoing
09:30:08 13 today. Let me explain something about causation.

09:30:11 14 You may find a defendant liable only if you conclude
09:30:16 15 the defendant was a proximate cause of a public nuisance. A
09:30:21 16 public nuisance may be proximately caused by a defendant's
09:30:24 17 act or failure to act. A defendant's conduct proximately
09:30:28 18 caused a public nuisance if the circumstances that
09:30:32 19 constitute the nuisance are the natural and foreseeable
09:30:36 20 result of that conduct.

09:30:37 21 There may be more than one proximate cause of a public
09:30:40 22 nuisance, but causes that are merely incidental are not
09:30:43 23 proximate causes. To be a proximate cause, the acts or
09:30:46 24 omissions of a defendant must be a substantial factor in
09:30:51 25 producing circumstances that unreasonably interfere with a

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public right to health or safety.

An individual defendant's conduct need not be independently capable, all by itself, of causing the public nuisance. There may be multiple causes of a public nuisance. The fact that some other cause or causes combined with the defendant's conduct in creating the public nuisance does not relieve that defendant from liability if the plaintiff can prove that the conduct the defendant engaged in was a substantial factor in creating the public nuisance.

A defendant's conduct is substantial if a reasonable person would regard that conduct as the cause, or one of the material, meaningful, or considerable causes, of the nuisance. If you find that the conduct of any defendant proximately caused a public nuisance, it is not a defense to liability that some other entity may also be to blame.

In addition, the plaintiff must show by the greater weight of the evidence that the conduct a defendant engaged in could reasonably be expected to cause an interference with public health or safety. A defendant does not, however, need to foresee that their conduct would lead to the specific nuisance that occurred.

I have instructed you that a public nuisance is an unreasonable interference with a right held by the public in common, and I have used the phrase, significant interference with a public right to health or safety. Let me define the

Charge to the Jury

terms "significant" and "unreasonable."

An interference with a public right may range from a petty annoyance to serious harm. An interference with a public right is not significant or unreasonable if it causes only a relatively slight amount of inconvenience.

An interference with a public right is significant or unreasonable if it causes greater harm than the public should be required to bear, considering all the circumstances. When you consider whether an interference with a public right is significant or unreasonable, some of the factors you may consider include the nature, extent, and duration of the interference, and the social value of the defendant's conduct.

When rendering your verdict on the plaintiffs' claims of public nuisance, you must consider each claim against each defendant separately. In other words, you must independently decide each separate plaintiff's claim against each separate defendant.

Thus, if you find that a particular plaintiff has proved its public nuisance claim by the greater weight of the evidence against a particular defendant, then your verdict must be for that plaintiff and against that defendant.

Similarly, if you find that a particular plaintiff has failed to prove its public nuisance claim by the greater

Charge to the Jury

09:33:40 1 weight of the evidence against a particular defendant, then
09:33:44 2 your verdict must be against that plaintiff and for that
09:33:47 3 defendant.

09:33:47 4 To repeat: You must independently decide each
09:33:51 5 separate plaintiff's claim against each separate defendant
09:33:55 6 and render your verdict accordingly. Just because you find
09:33:58 7 in favor of one plaintiff or one defendant does not mean you
09:34:01 8 must find in favor of any other plaintiff or any other
09:34:05 9 defendant.

09:34:05 10 The verdict forms will guide you through this process.

09:34:08 11 So those of you who were following along, if you just
09:34:12 12 put aside your instructions now, and we will have the final
09:34:17 13 arguments of counsel.

09:34:20 14 The way this works, because the plaintiff has the
09:34:23 15 burden of proof, the plaintiff will go first, and the rules
09:34:26 16 permit the plaintiff to reserve a small amount of time for
09:34:30 17 rebuttal.

09:34:31 18 So Mr. Lanier will proceed, and I anticipate his
09:34:35 19 arguments will take the balance of the morning. He will
09:34:39 20 take a mid-morning break at a convenient time. And then
09:34:43 21 after lunch, we will have, in turn, the final arguments of
09:34:47 22 each of the three defendants.

09:34:49 23 So, Mr. Lanier, you may proceed, please.

09:35:15 24 MR. LANIER: I think my mic is on, Your Honor.

09:35:21 25 No, it's not.

Closing Argument - Lanier

09:35:22 1 Mr. Pitts, you got the magic. Thank you.

09:35:22 2 CLOSING ARGUMENT BY PLAINTIFFS

09:35:38 3 MR. LANIER: All right. Your Honor, may it
09:35:39 4 please this Court, counsel, clients, ladies and gentlemen of
09:35:48 5 the jury, I feel like I've kind of gotten to know y'all a
09:35:52 6 little bit. Not because we've had a chance to visit, but
09:35:55 7 because I see what you wear, I see the masks, I watch you
09:36:01 8 walk in, I watch you walk out, I know when some are
09:36:03 9 celebrating birthdays -- by the way, Pete Weinberger is 71
09:36:09 10 today. Side note.

09:36:11 11 I know when some of you are celebrating birthdays. I
09:36:14 12 know when you're ready for a break. I've gotten to know you
09:36:18 13 some, and I'm sure you've gotten to know me some. You've
09:36:22 14 gotten used to my accent, I hope. My vocabulary is probably
09:36:27 15 a little different than a lot of folks around here. But
09:36:31 16 I've taken a lot of solace in getting to try this case to
09:36:43 17 you.

09:36:43 18 The judge picked so many people because he expected --
09:36:46 19 and, frankly, I think all of us expected -- to lose people
09:36:50 20 in the process of this. This is a long trial. And there's
09:36:53 21 a lot that can come to you in your plate, whether it's
09:36:57 22 school or whether it's whatever job you've got or whatever
09:37:00 23 you're doing. And the rules require us to keep at least 6
09:37:06 24 people. So the judge had us loaded where we could lose 8
09:37:10 25 people and still keep a verdict. And yet, here you are.

Closing Argument - Lanier

09:37:17 1 And we've got you here because you're so blasted interested
09:37:24 2 in this, and that's so apparent to us. And I hope it does
09:37:32 3 not escape your awareness that what you're about is a very
09:37:40 4 important case. It's part of a larger picture where we're
09:37:44 5 trying to figure out who's responsible and to what degree
09:37:49 6 for the opioid epidemic that plagues not just Northeastern
09:37:58 7 Ohio, but, frankly, plagues most places within the country.

09:38:03 8 And within the framework of that, His Honor has carved
09:38:05 9 out this case to give us a chance to focus on what
09:38:10 10 ultimately now are these three chain pharmacies. Because
09:38:14 11 they claim to take no responsibility: none, zero, zip. And
09:38:22 12 yet we think they play a significant role in this as that
09:38:27 13 last line of defense, and so we've come forward to try this
09:38:33 14 case.

09:38:33 15 I've been honored to be asked to lead this trial.
09:38:35 16 I've been so ably assisted. I mean, y'all know what Pete's
09:38:40 17 done, and you know I'm going to brag on my daughter for what
09:38:43 18 she's done. But I want to tell you Maria Fleming,
09:38:46 19 Ms. Fleming has taken care of all of the exhibits in this
09:38:49 20 case and making sure that we've got them, that they've been
09:38:52 21 admitted into evidence, that we've got our objections. Her
09:38:55 22 job. Frank Gallucci's job, just incredible what he's done
09:39:00 23 working on this. And so I come to you with a host of people
09:39:05 24 out there that have worked so hard on this case for years
09:39:09 25 now.

Closing Argument - Lanier

09:39:12 1 But what you're about is something of supreme
09:39:16 2 importance. Even before this trial you'd never heard of the
09:39:20 3 *Holiday*, I suspect. *Holiday* was a seminal case. It came
09:39:25 4 out of Florida. It was against CVS. Two of their
09:39:30 5 pharmacies down there had some major problems. And that
09:39:36 6 case was one that was published in the Federal Register so
09:39:41 7 that everybody would be on notice about what it said. And
09:39:46 8 what it said was profound. You'll have a redacted version
09:39:52 9 back there that you can look at and read yourself.

09:39:55 10 But what you're about here is not only every bit as
09:40:01 11 important as the *Holiday* case. What you're about here is
09:40:05 12 something that's even more important. Because you're going
09:40:07 13 to make decisions, and those decisions will be reported.
09:40:15 14 And the reporting of those decisions will set up the
09:40:18 15 standards by which these chain pharmacies and independent
09:40:21 16 pharmacies must act.

09:40:25 17 You are actually sitting in the seat now as finders of
09:40:29 18 fact to determine what the facts are that answer these
09:40:34 19 questions to determine what is permissible in our society
09:40:39 20 within the framework of the law and what is not. That's an
09:40:45 21 awesome, awesome responsibility, but it's an awesome,
09:40:51 22 awesome opportunity. And that's. . . that's what's driven
09:41:00 23 our team. Because we've shouldered that opportunity and
09:41:07 24 responsibility up till now, but today I hand it off.

09:41:09 25 I was talking to my wife this morning as we were

Closing Argument - Lanier

09:41:12 1 getting ready to come over here, and I said, you know,
09:41:15 2 Becky, this is like, you know, it's one of those football
09:41:22 3 games -- I'm not talking Browns. We don't talk about that
09:41:25 4 today, but it's one of those football games where -- and by
09:41:30 5 the way, I'd like to go on the record and say I am not a
09:41:34 6 Dallas Cowboy fan. If there is any doubt, just because I'm
09:41:37 7 from Texas, I like it when they lose, and I'd just like to
09:41:39 8 make that clear. You may hate me. I am a Kansas City fan,
09:41:45 9 but I am not a Dallas Cowboy fan.

09:41:47 10 But regardless, there comes a point where in
09:41:51 11 someplace, the quarterback hands off the ball, someone else
09:41:54 12 starts running with it, or he throws the ball, and at that
09:41:58 13 point all he can kind of do is watch.

09:42:04 14 Well, today, I get to hand this to y'all, and I'm
09:42:10 15 done. Y'all get to figure out what's okay and what's not.
09:42:15 16 Y'all get to decide. Y'all get to form maybe the most
09:42:21 17 seminal case in pharmaceutical history, in pharmacy history,
09:42:26 18 dealing with the Controlled Substances Act. That's you.

09:42:30 19 And so what we're about here today is something that's
09:42:33 20 real important. I've put together a PowerPoint presentation
09:42:37 21 here. It -- some of these slides you've seen before, but
09:42:40 22 this is just sort of the national crisis. And this has
09:42:47 23 national ramifications. It's not the kind of thing where
09:42:51 24 people will say years down the road, oh, that only pertained
09:42:54 25 to those three pharmacies in Northeastern Ohio in Lake and

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09:42:58 1 Trumbull County. No, this will have ramifications all
09:43:01 2 around the United States of America.

09:43:03 3 And, so, as you examine it, and you examine this
09:43:06 4 opioid crisis, which His Honor has just done a Yeoman's job
09:43:11 5 over the years of trying to administer this massive beast of
09:43:16 6 litigation. Hand-selected to do so, I might add. And what
09:43:24 7 we've learned and what you've gotten a glimpse of as they've
09:43:28 8 talked about the different parties that have been sued
09:43:30 9 before and what's happened to this and what's happened to
09:43:32 10 that is as we try to sort through this very complicated
09:43:36 11 beast to determine who needs to be at the table to assess
09:43:40 12 their share of responsibility. And that's what we're here
09:43:46 13 to try to find out.

09:43:47 14 And so I suggested to you in opening that this is a
09:43:50 15 bit like a connect-the-dots picture, and if you don't
09:43:56 16 connect all of the dots, you don't get the right picture.
09:44:00 17 We can't describe the opioid mess and leave out some of the
09:44:04 18 dots. I said -- and I think it was heard wrong, it
09:44:13 19 certainly was misrepresented to you -- I said that a
09:44:18 20 pharmacist is not a gumball machine, that they have more
09:44:24 21 responsibility than simply taking your money and giving you
09:44:27 22 your pills. They have more responsibility than simply
09:44:31 23 looking at your prescription and determining did you forge
09:44:35 24 it. They have more responsibility than simply calling the
09:44:38 25 doctor and saying, are you sure. They go to school for

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09:44:44 1 years and years and take all of these things. They have to
09:44:47 2 take a test to get a license. The test, I might add, that
09:44:53 3 for decades was overseen by the National Boards of Pharmacy,
09:45:00 4 Carmen Catizone. But when you start looking at all of the
09:45:05 5 different parties responsible, then you begin to see more
09:45:09 6 fully what the true picture is, and that's the zebra in my
09:45:12 7 illustration.

09:45:13 8 So the question becomes, CVS pharmacy, are they part
09:45:17 9 of the problem?

09:45:20 10 The question becomes, Walgreens, are they part of the
09:45:25 11 problem?

09:45:26 12 Walmart, are they a part of the problem?

09:45:29 13 Now, the pharmacies, they don't mind telling you that
09:45:32 14 pharmacies can be a part of the problem. Because they'll
09:45:36 15 point the finger at Franklin, and they'll point the finger
09:45:40 16 at Overholt's. They'll tell you pharmacies have
09:45:44 17 responsibilities. They'll tell you they can be part of the
09:45:46 18 problem. They're just saying, not me. And that's what you
09:45:52 19 get to sit here and decide. And the judge says you do that
09:45:57 20 by the preponderance of the evidence. That means the
09:46:00 21 greater weight of credible evidence. That means that I've
09:46:05 22 got to show that it's more likely than not that they were
09:46:14 23 the contributing part of the problem, that they have to be
09:46:18 24 under the law.

09:46:19 25 So I've got to show that.

Closing Argument - Lanier

09:46:21 1 Now, I think we've done it not just by the greater
09:46:24 2 weight of credible evidence. I think we've done it
09:46:27 3 tremendously. And I'm going to march through that with you.
09:46:33 4 But if you get back in that jury room and you start hashing
09:46:37 5 this out with each other and someone says, you know, I'm not
09:46:41 6 sure that that's totally proven, you can remind the other
09:46:47 7 jurors that they can have 49 percent doubt and still vote
09:46:50 8 for the counties in this case. I mean, this is a
09:46:57 9 preponderance of the evidence, and the judge gives a really
09:47:00 10 clear instruction on that.

09:47:01 11 So you're not going to be totally surprised, but,
09:47:04 12 yeah, I've got a road map for closing argument. I'm sorry.
09:47:07 13 I'll pass it out.

09:47:11 14 Juan, could I please have the ELMO.

09:47:18 15 Juan, it looks like it has frozen our photograph. Do
09:47:22 16 we have an ability to unfreeze it?

09:47:31 17 And if not, I'll just stand up and hold it. I get to
09:47:34 18 stand close to the jury, but if you can figure out how to
09:47:37 19 make that work, that would be wonderful.

09:47:43 20 Ah. Juan Wilson. Write it down. He's going to be
09:47:48 21 famous.

09:47:49 22 So here is your -- a little bit bigger -- your closing
09:47:55 23 argument road map.

09:47:58 24 I've got three stops along the way. I want to talk
09:48:01 25 about a recap of the trial. And somewhere in there we'll

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09:48:06 1 have our morning break. And then I want to talk about the
09:48:10 2 judge's questions and instructions that have been shown to
09:48:13 3 you.

09:48:14 4 Now, don't die over this, but the judge has given each
09:48:19 5 side 3 hours today to argue. So the way mine is divided up,
09:48:24 6 I've got 2 and a half hours. I hope to finish by the lunch
09:48:27 7 break. And then once I'm done, each of the defendants have
09:48:32 8 up to 3 hours when you add it all together. So they don't
09:48:36 9 get 3 hours apiece. But that's my road map. I don't know
09:48:39 10 what order they'll go in, and I don't know how much. But
09:48:42 11 we'll detour from what I'm doing for you to hear from CVS,
09:48:46 12 Walmart, and Walgreens. And then we'll come back to me, and
09:48:48 13 I'll save 30 minutes at the end of the day to recap a grand
09:48:53 14 finale, if you will, having heard their arguments, I get a
09:48:59 15 chance to respond. And that's the way the rules are set up.

09:49:03 16 So in opening I told you that we were --

09:49:06 17 Juan, why don't we go back to the PowerPoint, please.

09:49:11 18 In opening I told you that we were binge watching --
09:49:13 19 and that was the theme -- you've been binge watching
09:49:16 20 opioids. This is a chance for you to get your popcorn, if
09:49:19 21 you eat it this early in the morning, sit back, because
09:49:21 22 we're going to finish binge watching in closing argument the
09:49:24 23 opioid trial as I review the evidence, and we're going to do
09:49:26 24 it with those three stops, the recap, the questions, and
09:49:29 25 then the finale at the end. But we'll start with the recap.

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09:49:32 1 So if I was going to recap opioid epidemic episode 1
09:49:35 2 recap, where would I start? Do you realize how many
09:49:38 3 witnesses you've heard? I've been working on this case for
09:49:42 4 what seems to be a lifetime, and I couldn't remember all the
09:49:46 5 witnesses you've heard. I don't -- I admire that you're
09:49:51 6 taking notes. Did you know some judges do not let jurors
09:49:54 7 take notes?

09:49:55 8 I can't understand how they could ever do this,
09:49:57 9 Your Honor, but I thank you that you've given them that
09:49:59 10 chance.

09:49:59 11 Because he is driving for you to be in the best
09:50:04 12 position you can to make a fair and just decision. That's
09:50:09 13 why he's made the rulings he's made. Sometimes I have been
09:50:12 14 so frustrated with him and his rulings, I'm sure the other
09:50:15 15 side has as well, but he's just calling those balls and
09:50:19 16 strikes. He doesn't care about anything except trying to
09:50:21 17 get to what's right. And that's why we're here right now.

09:50:24 18 So instead of just doing this hodgepodge, I thought I
09:50:27 19 would just walk through the witnesses basically in the order
09:50:29 20 in which they came. I have taken out the Giant Eagle
09:50:33 21 witnesses. I'm not allowed to tell you why Giant Eagle is
09:50:37 22 not a part of this case anymore, it shouldn't be an issue,
09:50:40 23 but they're not.

09:50:41 24 I've also taken out the dispense -- the distribution
09:50:45 25 part of this case. Frankly, we were running out of time to

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try and put it all together, and so we decided that we would just look and focus in on the dispensing. And that's what we're doing at this point. So one or two witnesses will be missing in my recap here because of that.

But the first witness I put on the stand was Tom Davis. He was vice president of pharmacy services for CVS. CVS is now seated right over there (indicating) at that back table. And he talked, and he said a few things. I don't think his testimony was as full as I would have liked it to have been because he was very limited in what he knew, even though he was a vice president of pharmacy services.

Now, he did admit that opioid abuse and addiction is a devastating issue. I did get that from him.

He also -- got some documents, and you're not going to be stunned to find out I have some documents to show you as we go along. You'll also hear from him that he was the one who had Michelle Travassos and Nicole Harrington worked for him. So you heard from both of them. He was their boss.

But he wasn't really tuned in beyond that. He knew about CVS's multiple settlements. We had testimony from him that he knew about CVS selling prescription data to IMS. They would take the prescription data and sell it to another service company. And so we had that kind of testimony from him.

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1 But after he finished the stand, we went from him to
2 Anna Lembke. Dr. Lembke. She's one of the most impressive
3 people I've ever had the honor of putting on the stand. I
4 started trying cases -- I got out of law school in 1984. So
5 I've been doing this for 37 years. I've been fortunate
6 enough to try cases from California to New Jersey and all
7 points in between. She's one of the best witnesses I've
8 ever had a chance to put on. So impressive.

9 I mean, she is someone who explained addiction, but I
10 do hope, you know, if you get a chance sometime -- all
11 right, look. It's not like the most riveting reading, but
12 it's actually really captivating. But she's like the one
13 that all of the podcasts turn to, the news turns to,
14 academia turns to, because this is her deal. She's a
15 specialist in this. She actually -- it's not an ivory tower
16 specialist. She treats people on a regular weekly basis as
17 well as writes, researches, and lectures, and teaches,
18 trains the next generation of doctors.

19 And she explained opioid addiction to you. She
20 explained this pleasure/pain balance. She explained how
21 humans are designed to seek pleasure and avoid pain, but the
22 problem is something happens. I'll tell you -- let me do it
23 this way. Let me pull up some of the ELMO notes that we had
24 with her and look at what she had to say.

25 Mr. Wilson, can we go back to the iTiVo, please?

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09:54:17 1 Thank you.

09:54:18 2 When I put her on the stand, she had this really great
09:54:22 3 ability to explain addiction. And so she -- you'll recall
09:54:30 4 these notes, I expect. She explained that dopamine is the
09:54:37 5 most important neurotransmitter. I mean, she had the
09:54:42 6 science down, how it activates in our brain to reward and
09:54:47 7 motivate, and it's got this loop. She explained how the
09:54:51 8 brain works hard to keep things level. And so when all of a
09:54:55 9 sudden you're in pain, your brain's yelling for pleasure.
09:55:03 10 But you give it the pleasure with the opioids, and then it's
09:55:05 11 yelling for pain because it wants to equalize, and talked
09:55:05 12 about how the brain starts adapting, neuroadaptation she
09:55:11 13 called it.

09:55:12 14 She talked about how one of the -- let's see. I've
09:55:16 15 got to scoot this over a little bit and make more room.

09:55:18 16 Thank you, Pete.

09:55:19 17 Opinion 10 of hers, that an increased supply of
09:55:25 18 prescription opioids contributed substantially to more
09:55:29 19 individuals, including newborns, becoming dependent on
09:55:35 20 opioids, increasing their risk for opioid-related morbidity
09:55:40 21 and mortality. The dependence effect.

09:55:43 22 She talked about how -- that's in addition to
09:55:46 23 addiction, that dependence is not addiction, but it's an
09:55:47 24 adaptation with withdrawal.

09:55:49 25 And I thought it was so very important how she

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09:55:52 1 explained all of this, because in the process, do you
09:55:54 2 remember what she did about side effects of opioid
09:55:57 3 dependence and addiction?

09:56:00 4 Depression. Not thinking as clearly. Increased pain.

09:56:08 5 Think back about the pharmacists who talked about, you
09:56:11 6 know, we had Ms. Stossel who talked about that one fellow
09:56:16 7 who is just getting mountains and mountains of
09:56:18 8 prescriptions, and she said, well, yeah, but I could tell he
09:56:21 9 was in pain.

09:56:21 10 And I asked her, do you know if maybe that was
09:56:23 11 withdrawal as opposed to he needs more opioids? Well, she
09:56:31 12 didn't know.

09:56:31 13 This was the fellow who was getting his prescriptions
09:56:35 14 from a doctor who, yeah, he says he's a rehabilitation
09:56:40 15 doctor, but the first thing he lists is he's a hormone
09:56:43 16 doctor. And yet hormonal imbalance is yet another trait,
09:56:48 17 side effect, of opioid dependence and addiction.

09:56:52 18 And so she talked about all of this. She explained
09:56:54 19 how important it is, and she explained, most importantly in
09:56:57 20 our case here, that the increased supply of prescription
09:57:02 21 opioids contributed substantially to more individuals
09:57:07 22 becoming addicted to opioids and transitioning from
09:57:10 23 prescription opioids to illicit sources.

09:57:13 24 You start out on prescription opioids. They're easy
09:57:18 25 to access. You can get them from the medicine cabinet. You

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can get them from a friend. You can get them from any oversupply where they're still out there and not being used. And you take them, and you get addicted, and you can buy more on the street until, all of a sudden, the sources start drying up. And then the price becomes so high, it's cheaper to buy heroin, or it's cheaper to buy street fentanyl, or it's cheaper to buy some other street opiate because you've got to get the opiate satisfaction.

And that's what it is. And it's a biological problem.

She gave us this chart about how all patterns of prescription opioid use lead to heroin, whether it's medical use or non-medical use.

And this isn't what she made up. This is something she grabbed from the Journal of Addiction Medicine, and she cited it accordingly. But she left no question. She said there's no doubt a cause and effect relationship exists between the oversupply of prescription opioids and the opioid epidemic. And she said that in the last several years it was more illegal drugs because the acts have moved to those drugs. But we have that.

And she not only testified to those things, even as an early witness, she testified to the cause being, in part, the actions of the chain pharmacy defendants in this case.

She expressed Opinion Number 2: When a supply -- when supply of an addictive drug is increased -- in other words,

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09:58:51 1 there's more of it -- more people become addicted to and
09:58:55 2 suffer the harms of that drug. Her example was alcohol and
09:58:59 3 prohibition.

09:59:00 4 Prescription opioids are as addictive as heroin, and
09:59:03 5 the defendants' conduct in promoting increased supply --
09:59:09 6 they were the spigot, they were the regulators, they were
09:59:12 7 the ones who were the last line of defense -- increased
09:59:15 8 supply of widespread access to prescription opioids has
09:59:19 9 resulted in an epidemic of opioid addiction and overdose
09:59:22 10 deaths.

09:59:23 11 She used this chart (indicating). She showed you from
09:59:28 12 the CDC how you could parallel the increases in opioid sales
09:59:32 13 with opioid deaths and substance abuse treatment.

09:59:38 14 And you can look at the chart and you can see, it's
09:59:41 15 exactly what she said. As the sales increased, the deaths
09:59:46 16 increased and the need for treatment increased. It just
09:59:49 17 walks right through.

09:59:50 18 And are doctors to blame for this? Oh, without a
09:59:54 19 doubt. A lot of doctors. 99 percent. Whatever the stat
09:59:59 20 may be. I don't know if 99 percent means someone did an
10:00:02 21 actual study or if it just -- that's just your way of
10:00:05 22 saying, like, most of them. 99 percent. I don't know.

10:00:11 23 But regardless, we know that those doctors were
10:00:14 24 influenced by Purdue Pharma and other manufacturers. But we
10:00:21 25 also know that there were some doctors who just didn't seem

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1 to care. And there were doctors in these counties who just
2 didn't seem to care. And there were doctors in Florida who
3 just didn't seem to care. And one of the Walgreens -- I
4 believe it's Walgreens. We'll look at the prescription --
5 but one of the defendants, one of the prescriptions that we
6 looked at was a person saying, you know, I'm tired of
7 filling these drugs for this person who's going to the pain
8 doctor in Florida, as if there aren't good doctors around
9 here. But they keep filling them anyway.

10 And, so, these doctors, yeah, they shouldn't be
11 writing all these prescriptions, but the pharmacies have a
12 role in it too. Please understand, not one of these three
13 pharmacies are charitable foundations. They are all for
14 profit companies. No problem with that. I'm an American.
15 I'm a believer in capitalism. But they are all for profit.
16 They make money off every pill they sell. And if they don't
17 want to do the work right to sell these pills, then let the
18 pharmacies that will do the work right get the business.

19 They don't have to sell C-II drugs.

20 And their idea of, well, we want to make sure that
21 patients are getting their medicine. Well, patients can get
22 their medicines at pharmacies that do it right. They don't
23 have to sell the drugs, they choose to sell the drugs.
24 They're not doing it pro bono. Oh, we want to make sure you
25 get your medicine. Here, we'll just you give you this at

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10:02:18 1 cost. No, they're making money off every pill they sell.

10:02:22 2 They don't make money off a refusal to fill.

10:02:24 3 And so you see the sales. You see the deaths. And we
10:02:28 4 had it from Dr. Lembke who said, yes, there are certain
10:02:32 5 things that doctors know. But there are certain things that
10:02:35 6 the pharmacists know that the doctors can't.

10:02:38 7 The pharmacists can have the physical impression of
10:02:41 8 whether the person's showing up drunk or not, whether the
10:02:44 9 person's showing up in withdrawal or not.

10:02:50 10 They have their own data. They have a chance to look
10:02:53 11 through OARRS. They have a chance to look through other
10:02:55 12 things. They can look at the travel distance. They can
10:02:58 13 look at the doctors that have been filling these
10:03:01 14 prescriptions. They can get prescription histories. They
10:03:04 15 can know if there's a pattern of prescribing. They can see
10:03:07 16 when someone shows up with two prescriptions, one from one
10:03:10 17 doctor and one from another.

10:03:13 18 Those are unique things that the pharmacists know that
10:03:16 19 give them responsibility as well, and that's why ultimately
10:03:21 20 Dr. Lembke gave Opinion 14, that many parties bear
10:03:25 21 responsibility for the misrepresentation of safety and
10:03:29 22 efficacy, and the ubiquitous, the everywhere distribution of
10:03:34 23 prescription opioids, the unchecked dispensing of
10:03:37 24 prescription opioids, which resulted in the ongoing
10:03:44 25 epidemic. To the extent other factors contributed, those

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1 were exploited to increase of harm.

2 So you've got --

3 Juan, if we go back to the PowerPoint, please.

4 We've got Dr. Lembke, and she testified accordingly.

5 She testified about how heroin is -- is there a problem with
6 heroin apart from prescription opioids? Was there a problem
7 with heroin before prescription opioids? Yes. I suspect
8 there were.

9 I remember when I was -- all right. Some of you are
10 my age. Some of y'all are too young and y'all are going to
11 laugh and say what on earth's he talking about. But I can
12 remember when I was a kid there was a real popular group
13 called Three Dog Night, sang *Joy to the World*, *Jeremiah Was*
14 *a Bullfrog*, and all that stuff. Chug Negroln, lead singer,
15 heroin, just destroyed the group and destroyed his career
16 for years at least. That's not because of prescription
17 opioids. People can go straight to heroin, and they can
18 just get caught in it and messed up in it.

19 We're not fussing that.

20 But we're also cognizant of the fact that people can
21 get started on prescription opioids, and the studies
22 indicate that a preponderance -- most of the people on
23 heroin that are dying got prescription opioids in their
24 start. It's a complicated web, but opioids have a role
25 here. She explained the same to be true with fentanyl.

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10:05:15 1 So Dr. Lembke comes and explains the critical roles of
10:05:21 2 the pharmacies and how these pill bottles and this
10:05:25 3 oversupply. You know, when someone goes to the dentist and
10:05:27 4 they should get 3 days, and the dentist writes them from
10:05:31 5 9 days or 10 days. Well, what happens to the other 6 days
10:05:34 6 they sit in the pill cabinet?

10:05:38 7 And the thing about it is, is we're not talking here
10:05:41 8 about an oil change to your car. We're talking about
10:05:46 9 something that has the ability to take your life. We're
10:05:52 10 talking about something that has the ability to grab you by
10:05:56 11 the throat and change your brain chemistry. It can take a
10:06:02 12 cucumber and turn it into a pickle. And once you do that,
10:06:06 13 you're stuck with that pickle. I have yet to see anybody
10:06:09 14 who can turn a pickle back into a cucumber. And that's what
10:06:15 15 Dr. Lembke was explaining. It alters your brain chemistry.
10:06:20 16 This is serious stuff. And if anybody ought to know it,
10:06:23 17 it's the people who go to school for 5-plus years to learn
10:06:26 18 how these drugs work in the human body.

10:06:31 19 Doctors take a drug course or two, but that's all
10:06:34 20 these folks are learning is the drugs, what they do, and
10:06:38 21 what the law is around them.

10:06:42 22 So after Dr. Lembke, we brought in Carmen Catizone.
10:06:48 23 He described himself as a pharmacist from the South Side of
10:06:53 24 Chicago, I think. First one in his family to go to college.

10:06:59 25 Do you remember when I was getting ready for him, I

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1 got to meet with him a little bit the night before. And I
2 wanted to be able to tell you guys things about where he
3 lives and what his family's like. Oh, no. Because of the
4 death threats that he told you about from the stand, where
5 he has been used as a witness by the government to deal with
6 drug situations, he doesn't disclose that information so
7 readily.

8 But he was willing to come here. He was willing to --
9 we retained him as an expert. We hired him. We paid him a
10 fair hourly wage to do the work. But we had grabbed him
11 because he's the best we could find.

12 I mean, they could go get Dr. Wailes from California
13 and pay him 14, 1,395 an hour, when he's just a pain doctor
14 to come in and say Carmen doesn't know what he's talking
15 about. But Carmen Catizone's the guy, for decades, the head
16 of the National Association of Boards of Pharmacy. That
17 means the Ohio Board of Pharmacy, the Texas Board of
18 Pharmacy, the Michigan Board of Pharmacy, the New York Board
19 of Pharmacy, all of them together. This is the guy.

20 This is the guy who testified about pharmacy standard
21 of care regarding red flags and documentation. Because
22 that's ultimately what's involved here. The -- I've had a
23 chance to look at the slides of the defense. They've had a
24 chance to look at my slides. I don't know what they're
25 going to say with those slides, but I'm going to surmise. I

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10:08:51 1 suspect they're going to tell you there's no legal
10:08:54 2 requirement to document.

10:08:58 3 Well, what does the law have to say about this stuff?
10:09:01 4 You're going to hear about it, but I want to show you just
10:09:05 5 one of the principal parts of the law. And this part of the
10:09:09 6 law comes from the Code of Federal Regulations. This is
10:09:13 7 what it says.

10:09:14 8 It says specifically, all applicants, all
10:09:33 9 registrants -- these are companies that register to sell and
10:09:38 10 market in C-IIs -- shall provide effective controls and
10:09:46 11 procedures to guard against theft and diversion of
10:09:50 12 controlled substances.

10:09:52 13 Now, what is an effective control, an effective
10:10:00 14 procedure? The law doesn't specify in that statute, that
10:10:05 15 regulation exactly what it is. And they could ask, ask
10:10:10 16 Joe Rannazzisi, DEA man, does the law say that you -- is
10:10:14 17 there a regulation that says you must document? He'll
10:10:22 18 answer honestly, no.

10:10:23 19 It was a regulation that says you must provide
10:10:25 20 effective controls and procedures. And the DEA doesn't tell
10:10:31 21 you what that is. Now, you find out from reading cases like
10:10:34 22 *Holiday*. You find out from reading cases like *East Main*.
10:10:39 23 You'll find out from reading cases like *Lake* and *Trumbull*
10:10:45 24 because that's the decision that's being made.

10:10:48 25 We know that the State Board requires you to follow

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1 standard of care, and we know that standard of care says you
2 document. We know that the companies' policies that they
3 have put in place supposedly to meet this regulation say
4 document. They say it's imperative to document.

5 But Carmen Catizone -- if we go back to the
6 PowerPoint, please -- Carmen Catizone testified about those
7 pharmacy standards of care and about the flags and the
8 documentation. He said one thing that's clear. It's a
9 no-brainer. You must resolve red flags before you dispense
10 the drug.

11 Now, there's a host of red flags. Some people have
12 identified 25, 26, 27 red flags. We just culled it down to
13 16 or 17 that were easy to zoom in on based upon the
14 prescription data itself. You know, a red flag of someone
15 showing up tanked when they're getting their drugs. You
16 can't tell when that was there or not, you know. Or three
17 people showing up in the same car. That's not going to be
18 something we could go identify, even though those may be red
19 flags.

20 But Carmen Catizone said, that's a no-brainer. You
21 got to resolve red flags before dispensing. That's the
22 requirement. That's the standard of care. That's what
23 *Holiday* said. That's what *East Main* said. That's what a
24 number of cases have said. That's just part of it.

25 And not only must you do that, but you must document

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1 that resolution as well. That's part of the Ohio Board of
2 Pharmacy regulations. That's part of the policy, the
3 standard of care, I should say. It's part of the standard
4 of care, not the regulation. The regulation is you follow
5 the standard of care. But it -- in essence, that's what it
6 is.

7 So you've got to document red flag resolution. Any
8 companies know this. They'll put witnesses on the stand
9 that say we don't do it. But at the same time, they're
10 faced with their policies that say you're supposed do it
11 because those are the policies that live up to the law.

12 He looked at 1,800 to 2,000 actual prescriptions from
13 the counties, and that's 1,800 to 2,000 depending upon the
14 defendant. Walmart only produced 1,800, but CVS, 2,000,
15 Walgreens, 2,000, over a 10-year time span, they were
16 totally randomly selected. Nobody had their finger on the
17 scale. Nobody was cherry picking. Totally random selection
18 overseen by His Honor, overseen by the parties. And then he
19 looked at them. He studied each one individually, and he
20 saw that they fell short. And he testified to that with
21 you.

22 If we go to the ELMO, please, Juan, to the iTiVo.

23 He was -- it's interesting to me. Look at his
24 opinions for a moment. See if this reminds you of what
25 happened those maybe days ago. He started out talking about

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10:14:21 1 the legal framework. He explained --

10:14:23 2 Okay, Juan -- it did it again, so I'm going to turn
10:14:28 3 it -- I'm going to do what I saw you do. You turned it off
10:14:31 4 and then you turned it on.

10:14:34 5 Look at that. That's kind of scary.

10:14:40 6 See if these remind you of his testimony.

10:14:43 7 Opinion 1: The practice of pharmacy is governed by
10:14:48 8 with well defined laws and regulations both at the national
10:14:52 9 and statewide levels.

10:14:54 10 He called it the most regulated profession.

10:14:56 11 He talked about how states require security systems
10:14:59 12 and backup systems and recordkeeping.

10:15:04 13 Pharmacy standard of care. That means the standard
10:15:07 14 that any reasonable pharmacy is going to institute.

10:15:12 15 The DURs and other restrictions. And he talked about
10:15:16 16 all of that.

10:15:17 17 And then he gave this third opinion. He said that the
10:15:19 18 Federal -- which is the Controlled Substances Act -- and the
10:15:23 19 Ohio -- it's controlled substance laws and regulations that
10:15:26 20 require each defendant to maintain effective controls for a
10:15:33 21 closed system of distribution and dispensing that guards
10:15:37 22 against diversions.

10:15:38 23 That's just what the law is that I read you. That's
10:15:41 24 what the law says they've got to do.

10:15:43 25 Now, what does that mean?

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10:15:45 1 He testified that in terms of documentation, it's a
10:15:49 2 requirement of documentation. He said the law gives this
10:15:54 3 broad statement that you must comply with all good practices
10:15:59 4 or practices of standards.

10:16:02 5 Now, if that's the law, a broad statement, then the
10:16:06 6 question is simply on whether or not someone's violated the
10:16:10 7 law, the question is simply, did they comply with all good
10:16:14 8 practices or practices of standards, which is what he was in
10:16:16 9 a position to testify to.

10:16:19 10 And he said that cases, *Holiday, East Main*, these
10:16:27 11 other cases, are decisions and conclusions and findings that
10:16:31 12 should be binding on others. That's his view as a
10:16:35 13 pharmacist.

10:16:38 14 He said this was critical. He said documentation is
10:16:45 15 critical because another pharmacist might need it. He said
10:16:49 16 documentation is critical because when inspection shows red
10:16:54 17 flags resolved, then there's no diversion. And so you've
10:16:56 18 got it there. You've got proof. But if there is theft or
10:17:03 19 diversion, people identify it and it will send a message.

10:17:05 20 I don't understand how this trial evolved into one
10:17:08 21 where they kept asking witnesses, are you required to
10:17:11 22 document? Is there a specific regulation that says
10:17:13 23 document? The regulation says do the standard of care. Do
10:17:19 24 what you need to do. But they don't iron out, use this
10:17:23 25 computer program, use this algorithm, use this -- no.

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1 The law was written in 1970. The regulations are in
2 place to explain that law and the requirements of it. But
3 documentation, they know it's required. Their own records
4 say it's required. Their own policies say it's required.
5 Their own pharmacists say, yeah, we were taught that in
6 school, that you have to do it. And yet, somehow lawyers
7 can turn it into something where, well, there might be a
8 little crack or a crevice here because the regulation
9 doesn't specifically say document. It just says do the
10 standard of care, and let's -- standard of care is document.
11 Well, let's don't talk about that.

12 Did defendants comply with the obligations? He looked
13 at the red flags. He said the warning sign requires
14 additional review. And you must resolve it before
15 dispensing, and that's a critical responsibility. And so he
16 laid that out, and he laid it out in plain language. And he
17 explained that legal framework.

18 And thank you, Maria.

19 And then he went beyond that, and he talked about the
20 corporate responsibility. Don't just blame the pharmacists.
21 We're not in here. Look, they put three pharmacists on the
22 stand at the end -- well, two. One of them has just been
23 promoted to a supervisor or whatever. But Mr. Cook,
24 Ms. Militello, and Ms. Stossel. And y'all got to know me
25 during this trial. You got to know me pretty well. You got

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1 to see me cross-examine a lot of people. And I think you
2 can probably tell by my approach -- and I'm sorry, it's
3 transparent, I'm -- my wife always laugh that I've got no
4 chance of ever lying to her because she says you're reading
5 like a book.

6 But you would have seen me. There are some other
7 witnesses that I did not view favorably, and I was probably
8 harsher to them in my cross-examination at times. But those
9 three pharmacists, they're nice people. I don't have any
10 distaste for them. I appreciate what they're doing. You
11 know, they got families, they live in the community. I'm
12 not dumping on them. But I will tell you this: You can
13 hear them and hear what they're doing and see where the
14 company has failed. You can see where the company has let
15 them down without adequate training, with inadequate
16 policies, with inadequate tools.

17 You know, I've got here a toolbox, and I've yet to
18 find out how Juan and Jessie got this past security.

19 Your Honor, I'm not sure.

20 But they're both marines, so they can do just about
21 anything there is. That's what I've learned, but. . .
22 that's a hammer (indicating). That's really, really useful
23 if you want to drive a nail, or if you want to pull the nail
24 out because it's a claw hammer. Really good. I do not
25 recommend using this, however, to change a light bulb. Just

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10:20:59 1 not the right tool.

10:21:01 2 You know, if you want to get a screw, if you take the
10:21:05 3 screw and use a hammer on it, not only is it going to
10:21:08 4 probably bend the screw until it's like a mega screw, but
10:21:12 5 because of those grooves it's just going to gut into that
10:21:14 6 and the screw is useless. If you're going to put in a screw
10:21:17 7 and drive a screw, you're going to need a screwdriver. A
10:21:20 8 different tool for a different job at a different time.

10:21:26 9 All of these tools, whether you look -- I got a tape
10:21:30 10 measure. I can tell you the distance --

10:21:32 11 Excuse me, Your Honor. And doggone it, this was
10:21:37 12 Mr. Weinberger's birthday gift.

10:21:40 13 The distance between me and my daughter right now, I
10:21:43 14 can tell you, is about 78 inches. Really useful. But this
10:21:49 15 is not going to help me drive a nail.

10:21:54 16 I mean, I tried to forward this part. I didn't have a
10:22:01 17 hammer. It really doesn't work.

10:22:02 18 The pharmacies are responsible for giving the tools
10:22:07 19 and the training to these pharmacists.

10:22:09 20 The pharmacies are the ones that have that legal
10:22:12 21 obligation there. And that's why you've got this type of
10:22:19 22 testimony from Mr. Catizone.

10:22:24 23 Question: Does a chain pharmacy corporation through
10:22:29 24 the control it exerts over its agent pharmacies,
10:22:35 25 pharmacists, and pharmacy employees, techs, et cetera, hold

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10:22:41 1 responsibility for ensuring all dispensing of controlled
10:22:45 2 substances is carried out in accordance with the applicable
10:22:48 3 laws and lesions?

10:22:49 4 His answer was a profound yes, and he gave two
10:22:55 5 reasons: The pharmacy is the registrant. That's what the
10:22:58 6 law was talking about is the registrant's responsibility.
10:23:02 7 The pharmacy is the registrant, and the pharmacy is the
10:23:05 8 permit holder.

10:23:07 9 And so he went further, and he talked about how
10:23:10 10 corporate oversight, the corporation is who sets the
10:23:15 11 policies, they decide the number of staffing, they decide
10:23:18 12 when someone can take a break, they decide how much they're
10:23:22 13 going to pay, they decide the information system, they
10:23:26 14 decide the wait time policies and how quickly people are
10:23:29 15 supposed to get their prescriptions. They monitor the
10:23:33 16 pharmacists to verify compliance.

10:23:37 17 Remember the CVS? They even did a follow-up check to
10:23:42 18 see if people were complying. Didn't have good results on
10:23:45 19 it either. But that's all the corporate oversight. That's
10:23:49 20 the issue here.

10:23:51 21 I don't ever want this to become a case that's written
10:23:54 22 up in the books as Lake and Trumbull, and the decision is
10:23:58 23 that Pharmacist Number 1 or Pharmacist Number 2 made a
10:24:03 24 mistake. No, that's not what we're about.

10:24:06 25 And we're not about perfection either. The judge has

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10:24:09 1 that in the charge. Look, you're not going to call them all
10:24:13 2 right. A pharmacist isn't going to call them all right. I
10:24:16 3 don't care --

10:24:16 4 I'm dating myself again, Your Honor.

10:24:18 5 The Amazing Kreskin. Yeah. I mean, it can be someone
10:24:21 6 who can read minds, and they're still going to mess up
10:24:25 7 occasionally. That's not what we're here about. We're here
10:24:29 8 about national policies that are in place where, bless her
10:24:32 9 heart, Ms. Stossel has to say, I've got a choice between
10:24:35 10 documenting or visiting with the patient about their care.

10:24:42 11 I'm like, well, why can't you do both?

10:24:45 12 Time.

10:24:46 13 Well, who sets the staff? Who sets the metric of how
10:24:51 14 quickly you got to fill? Who decides?

10:24:54 15 Well, Mark, or Mr. Lanier, we're a busy store.

10:24:59 16 Okay. Well, maybe we can afford two pharmacists then
10:25:01 17 during those busy hours so that you can do your job right.

10:25:04 18 But that's not my complaint against her. That's my
10:25:09 19 complaint against the corporation. That's my complaint
10:25:11 20 against the oversight, because, as Mr. Catizone said, this
10:25:14 21 is top-down compliance.

10:25:16 22 You know, the corporation uses the data. They know
10:25:20 23 the medicines that have been bought. They know the
10:25:22 24 medicines that have been dispensed. They've got track of
10:25:25 25 doctors. They've got track of all of that. They've got the

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10:25:28 1 policy that says do it in a certain time or not. And that's
10:25:35 2 why corporate responsibility is so important here.

10:25:39 3 Mr. Catizone continued. Corporate oversight includes
10:25:43 4 established practices of pharmacies that should incorporate
10:25:47 5 top-down compliance programs. This is because the company's
10:25:51 6 got all of the pharmacy's info. The aggregate data. They
10:25:58 7 can identify trends. They can say, this is a store.

10:26:00 8 Look, I asked the witnesses, did you know if your
10:26:03 9 store was listed as a top 20 store, or an over 20 supply
10:26:07 10 store? Didn't even know.

10:26:12 11 The corporations have knowledge. And they're the ones
10:26:15 12 who need to be giving that data to the pharmacists.

10:26:20 13 So the question becomes, Mr. Catizone, under your
10:26:26 14 practice, can a pharmacy absolve itself of its
10:26:29 15 responsibilities under the Controlled Substance Act by
10:26:33 16 placing unilateral responsibility on the pharmacist
10:26:35 17 dispensing the prescription?

10:26:37 18 Answer: No.

10:26:40 19 Is a corporate chain pharmacy responsible for its
10:26:44 20 operations including individual pharmacies?

10:26:46 21 Yes.

10:26:48 22 And its employees, they've got to supply the tools.

10:26:54 23 So within the framework of that, another question that
10:26:57 24 the judge is going to have that he just read to you on the
10:27:01 25 charge -- and we'll look at it a little bit more later on,

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1 but it's a question of knowledge. Because the law says that
2 this has to be a knowing violation. And what does that
3 mean? And the law says you can't willfully close your eyes
4 to it. But these are knowing violations. I mean, the
5 companies knew. The companies, without a doubt, as Carmen
6 Catizone said, I would expect each defendant became aware
7 and remains aware of these requirements.

8 Understand, not everybody gets to sell opioids. You
9 have to register. You have to acknowledge yourself into
10 that system, and if you're doing that, you know that the
11 system requires you do things because you're opting into it.
12 You're saying, I want to be one of the people who does that
13 so I can make money off of it.

14 So, you know, this is something that the companies
15 clearly know.

16 This is something, you know, that -- these DEA
17 actions -- look, I really don't like getting speeding
18 tickets. And I, when I was a younger man, got more than I
19 do now. I used to be quite the aggressive driver.
20 Confession.

21 But I didn't get like a ticket every day. I didn't
22 get a ticket every time I sped. In fact, I dare say, I'd
23 get one about every 6 months at my height. I, like -- after
24 you get about three of those and your insurance comes in,
25 you sort of start driving differently. But I can remember

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1 getting 3 in a year and a half period one time. But I
2 promise you I was speeding a lot more than that.

3 The DEA doesn't have the person power. The DEA
4 doesn't have the resources. The State Board of Ohio doesn't
5 have the persons, power, and resources. The Lake County
6 Narcotic Task Force doesn't have it to go in and to do a
7 tear-it-up, tear-it-apart inspection on every pharmacy in
8 this country.

9 So they get tips, and they figure out where there's a
10 problem that they get alerted to, and they set up their
11 radar gun in there and they check it out. And that's what
12 these cases are. And I mean, the Ohio -- the Ohio *East Main*
13 case is an important case because it's Ohio. The Florida
14 *Holiday* case is an important case because it's a Florida,
15 and we know that people were going down there from Ohio and
16 coming back with drugs and going down there. I -- we know
17 all of that.

18 But the real reason those cases are important is
19 because they put everybody on notice. They caught CVS down
20 there where they had the tip and went after them. They
21 caught Walgreens. They caught Walmart.

22 And you say, well, those aren't these stores in this
23 county. No, but it's the company. And I argue it's the
24 company's policies or failure to enforce policies. And
25 that's why it becomes important.

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10:30:40 1 I've used 55 minutes so far.

10:30:43 2 You know, the sad part is, Your Honor, I know you gave
10:30:46 3 us 3 hours because we begged and pleaded. I could take
10:30:49 4 about 3 days if you'd let me, but I won't ask that.

10:30:52 5 THE COURT: No. No.

10:30:53 6 MR. LANIER: Okay.

10:30:55 7 You know, and then Carmen Catizone, before I leave
10:30:59 8 him, let me just tell you, look at this, Opinion 7: Each
10:31:02 9 defendant failed to timely implement and apply necessary
10:31:07 10 controlled substance diversion policies across its pharmacy
10:31:09 11 stores.

10:31:10 12 They did. In these counties.

10:31:13 13 And he did that, and he reviewed their actions. He
10:31:17 14 reviewed their prescriptions. He looked at how long it took
10:31:19 15 them to make changes in their policies.

10:31:22 16 Do you y'all remember --

10:31:24 17 Juan, you got my sifters.

10:31:26 18 Y'all remember in opening, one of the examples I used,
10:31:31 19 and I won't get the flower back out, Your Honor, but one of
10:31:35 20 the examples that I used was the idea that initially the
10:31:40 21 holes were so big that their screening process was letting
10:31:45 22 through almost all the prescriptions. And then the DEA
10:31:47 23 would slap them down or slap down someone else, and they'd
10:31:50 24 said, oh, my heavens, we're in trouble, and they'd get
10:31:54 25 something with smaller holes. But it still wasn't adequate.

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10:31:59 1 And you saw this in the trial. Oh, well, how about
10:32:03 2 that. You saw this in the trial. In fact, in the trial
10:32:06 3 what they'll do is they'll now take their current screen,
10:32:12 4 really, really fine mesh, and they'll use that current
10:32:16 5 screen and say, look, we've got the best screen in the
10:32:19 6 world.

10:32:20 7 And you've just got to say, yeah, guys, but it's a
10:32:23 8 little bit late. You know, where was your screen in 2000 to
10:32:28 9 2010 when this crisis was really hitting its zenith at that
10:32:32 10 point, when people were getting addicted, when the babies
10:32:35 11 were being born?

10:32:36 12 Now, understand, this is a snowball problem. This is
10:32:41 13 a problem that starts small and gets big. Because as one of
10:32:45 14 your juror questions asked, the question was something along
10:32:48 15 the lines of, if someone was in an age group, in the 40 to
10:32:52 16 55, and then 10 years later wouldn't they still, a lot of
10:32:55 17 them, be in that age group with still problems? And I was,
10:32:59 18 like, yeah, that's exactly right.

10:33:01 19 Because, you know, you get the babies that were born
10:33:05 20 to busted families or troubled families or absent families
10:33:09 21 and put into the foster system, and those babies are going
10:33:13 22 to be affected for the rest of their life. They're going to
10:33:16 23 be affected in the community. And it's going to snowball in
10:33:19 24 the community. You get the babies that are born with the
10:33:20 25 addiction problem, and it affects their mental development,

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1 according to Dr. Lembke and others. And they're not going
2 to do so well in school. They're not going to do so well at
3 work. And they're going to have trouble being a
4 contributing part of the community instead of a drain on the
5 community.

6 All of these are deep-rooted problems that happen when
7 the screens are big, and these companies should have been
8 the companies that were -- look, this common sense business
9 for a moment.

10 If I'm a pharmacy, mom and pop, small chain, whatever,
11 big chain, but let's stay mom and pop, or a small chain. If
12 I'm a pharmacy and I'm going to do it right, it's going to
13 take longer than 15 minutes a prescription. I'm going to
14 have to upset some of my customers because I'm going to have
15 to turn some of them away. I'm going to have to tell some
16 of them, I'm sorry, I can't fill this prescription till
17 tomorrow because we can't get your doctor on the phone. I'm
18 going to have to invest in a computer system that gives me
19 OARRS as soon as it comes up and not years later when it's
20 made mandatory.

21 If I'm going do it right, it's going to take time,
22 energy, money, and resources. How am I going to compete
23 against the Walgreens, the Walmarts, and the CVS that can
24 pop up anywhere?

25 How am I going to compete if they're allowed to cut

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10:34:59 1 corners?

10:35:00 2 How am I going to compete if they don't have to have a
10:35:03 3 pharmacist to do it right?

10:35:04 4 How am I going to compete if they're using big screens
10:35:07 5 while I'm using a fine screen?

10:35:10 6 And I've got choices. I can either quit practicing,
10:35:14 7 close my shop, or I can start taking the same shortcuts and
10:35:20 8 the same filters, or I guess I could sell to them. But
10:35:30 9 that's the economics that are involved in this case. That's
10:35:33 10 the common sense economics.

10:35:35 11 These companies should be the leaders. They should be
10:35:38 12 the leaders out there. They should be the ones in the year
10:35:41 13 2000 that say, hey, this ain't happening to us. We've got
10:35:46 14 the screen and it's a tight screen. And we shouldn't have
10:35:48 15 to hear them say, come into court, with this idea of, oh,
10:35:53 16 look, we had screens back in 1998 -- Walgreens will tell you
10:35:59 17 that in their closing -- well, yeah, but they were pretty
10:36:04 18 big holes on those screens. Or else why would you have
10:36:08 19 changed it? The fact that you had to change it time and
10:36:16 20 time and time again is because your screens are too big and
10:36:21 21 holes.

10:36:21 22 Okay. Rachel is going to give me a note in a minute
10:36:24 23 that says I'm really blowing it on time so I got to keep
10:36:27 24 going.

10:36:27 25 Once controlled substances diversion policies were

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10:36:30 1 developed, each defendant then failed to monitor and enforce
10:36:34 2 the policies across their stores.

10:36:38 3 We had pharmacists who came in who had never even
10:36:41 4 heard of some of the cases. They didn't even know what was
10:36:45 5 going on. They hadn't been trained in it.

10:36:50 6 We had pharmacists coming in who thought
10:36:55 7 documentation, where it says it's imperative to document,
10:36:57 8 they thought that meant it was a suggestion. They don't
10:37:01 9 understand the policy was, imperative means you must.

10:37:05 10 But people's lives are important. This is serious
10:37:10 11 stuff, and that's why when Carmen Catizone said each
10:37:15 12 defendant's local stores filled thousands of prescription
10:37:18 13 presenting red flags without evidence of resolving those,
10:37:21 14 that's a big deal. That's a huge deal.

10:37:23 15 Look at some of what he said.

10:37:26 16 The red flags, you've got those. I'm going to skip
10:37:29 17 those in the interest of time because I want you to see some
10:37:31 18 of the actual prescriptions.

10:37:41 19 He got to each defendant's pharmacies in Lake and
10:37:45 20 Trumbull County filled thousands of prescriptions
10:37:46 21 representing red flags without evidence of resolving them.

10:37:49 22 We went through the funnel with him.

10:37:50 23 The funnel was -- all the funnel was was an
10:37:53 24 explanation of how he got to those prescriptions he looked
10:37:56 25 at. And the funnel has become this huge discussion point

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10:38:00 1 because of the statistics of how many were bad and how many
10:38:05 2 weren't bad, and all the rest. And Ms. Swift put up her
10:38:09 3 modified funnel where she argues that just 25 percent of the
10:38:12 4 prescriptions were bad or something like that. I don't
10:38:15 5 care. If 1 out of 5 isn't done right, that's massive.

10:38:22 6 I still think Carmen had it right. I think his
10:38:25 7 numbers were right. I think the 90 percent is right, but
10:38:28 8 you can take it at 20 percent. We still have problems.

10:38:32 9 Like this. Look at this. This is an actual CVS note.
10:38:36 10 Credit card on file. Use to pay. Patient told me, person,
10:38:41 11 person, person, or like, like initials, doesn't live in
10:38:44 12 Florida, just travels there to see this for pain medicine.

10:38:49 13 How many people from Lake and Trumbull go, oh, I just
10:38:54 14 got to go to Florida, I got to go see a pain doctor to get
10:38:57 15 my opiate prescription?

10:38:59 16 I told them that they need to see a local pain
10:39:02 17 management for all pain medications next time. This will be
10:39:06 18 our last time filling oxy 15, 30 milligrams for this person
10:39:10 19 from Dr. Hamies.

10:39:13 20 Well, why are you filling it this time? And how many
10:39:16 21 times have you been filling? But this is just typical and
10:39:23 22 it's not properly documented.

10:39:24 23 950 of the prescriptions contained no information
10:39:27 24 across all of these fields. That's out of 2,000 for CVS.

10:39:30 25 Of these 950 prescriptions with nothing in the

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10:39:35 1 relevant note fields, 686 also had nothing documented on the
10:39:38 2 hard copy. 34 percent of the sample.

10:39:44 3 Question: Is dispensing of red flag prescriptions
10:39:47 4 without conducting adequate investigation or due diligence
10:39:50 5 likely to lead to diversion?

10:39:52 6 Yes. That's cause. That's causation. It's also
10:39:57 7 proximate cause. It tells you that it's foreseeable. It
10:40:01 8 tells you that they knew it.

10:40:02 9 Walgreens. 508 days of oxycodone?

10:40:16 10 Where -- does it not strike you as bizarre that
10:40:20 11 Walgreens has got prescriptions like this in their 508 days,
10:40:24 12 and then they put on the stand, or the defense puts on the
10:40:28 13 stand, Mr. Hill, ex-DEA fellow. By the way, nice guy.
10:40:34 14 Another one that I wasn't taking issue with. I think he got
10:40:37 15 offended when I suggested that he shouldn't be paying that
10:40:40 16 service. He ought to be able to bill the money himself
10:40:44 17 because he's -- brings a level of expertise, and he's got
10:40:49 18 something to say and I thought that was important.

10:40:52 19 But he, we get him on a live lecture that we play
10:40:56 20 where he says, if someone has a prescription for 6 months of
10:41:03 21 opioids, that person's an addict.

10:41:11 22 DEA guy knows it. The expert they hire will say it,
10:41:14 23 and yet they're sitting on prescriptions of 508 days of oxy.
10:41:22 24 365 days in a year, unless it's leap year, 366 that year.
10:41:26 25 This is over a year and a half.

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10:41:28 1 And then Walgreens relevant note fields, 1,237 were
10:41:33 2 blank across all comment fields, 61 percent of the samples.
10:41:37 3 Of the ones that were hard copies, 940, 47 percent blank.

10:41:43 4 And so, you know, well, they say you should look back
10:41:48 5 in the older notes fields. Those are the ones that
10:41:51 6 disappear.

10:41:54 7 You've got the same problem. I don't mean to let CVS
10:41:57 8 and Walmart off on this. You can recall what all he said.

10:42:02 9 Your Honor, I know you wanted to take a break about
10:42:04 10 now, so I'm going to pause at this moment, and I will resume
10:42:09 11 when you're ready for me to.

10:42:12 12 THE COURT: Okay. Thank you, Mr. Lanier.

10:42:13 13 Ladies and gentlemen, we'll take our mid-morning
10:42:16 14 break, 15 minutes, and then pick up with the balance of
10:42:19 15 Mr. Lanier's closing.

10:42:20 16 Thank you.

10:42:21 17 (Jury excused from courtroom at 10:42 a.m.)

10:42:52 18 MR. DELINSKY: Your Honor, may I be heard for
10:42:55 19 a moment when it's appropriate?

10:42:56 20 THE COURT: All right. Close the backdoor,
10:42:57 21 please.

10:42:58 22 Everyone can be seated.

10:43:07 23 Yes, Mr. Delinsky.

10:43:08 24 MR. DELINSKY: Your Honor, I'm loathed to ever
10:43:10 25 interrupt counsel in closing argument. We did not interrupt

10:43:14 1 in opening argument. We didn't interpose objections, but
10:43:19 2 that hour crossed the line in several respects, and I feel
10:43:24 3 compelled to set forth my objections and in certain spots to
10:43:27 4 request curative instructions.

10:43:30 5 First, Your Honor, Mr. Lanier said that it is the job
10:43:33 6 of this jury to decide what is permissible for pharmacy
10:43:38 7 practice and what is not.

10:43:39 8 He called this the most seminal case in pharmacy
10:43:42 9 history under the Controlled Substances Act, and he told the
10:43:46 10 jury that it was up to them to set the standard for the
10:43:49 11 future. And that is not at all what this case is about.

10:43:52 12 This case is about the elements of public nuisance.
10:43:55 13 It's not about setting new standards under the Controlled
10:43:59 14 Substances Act. It's far from that, and I think we need a
10:44:01 15 curative instruction on that. That's first.

10:44:05 16 MR. LANIER: Can I answer that one first?

10:44:06 17 THE COURT: Well, let's stay with that. All
10:44:08 18 right.

10:44:08 19 MR. LANIER: All right. Your Honor, I have to
10:44:11 20 prove under public nuisance that this was illegal or
10:44:14 21 intentional, and so those are the issues that are involved
10:44:18 22 here. And this is a huge, important case for that very
10:44:21 23 reason. I don't think what I said was wrong at all. I
10:44:25 24 think that what I said is dead-on accurate.

10:44:28 25 MR. DELINSKY: But there's a difference --

10:44:29 1 THE COURT: All right. I think it's argument,
10:44:31 2 Mr. Delinsky.

10:44:32 3 MR. DELINSKY: Okay.

10:44:32 4 THE COURT: The issue in this case is what
10:44:36 5 if -- what is the obligation of a pharmacy under the
10:44:39 6 Controlled Substances Act --

10:44:40 7 MR. DELINSKY: But, Your Honor.

10:44:41 8 THE COURT: -- and did these pharmacies comply
10:44:44 9 with their obligation to have effective controls and
10:44:47 10 systems. That's what the case is about, so. . .

10:44:49 11 MR. DELINSKY: Your Honor, next --

10:44:51 12 MR. STOFFELMAYR: Excuse me, Mr. Delinsky.

10:44:52 13 Judge, just -- just on that, I want to reiterate, we
10:44:55 14 heard your ruling. I'm not asking you to reconsider at this
10:44:57 15 point. But I do want to make you aware that I do expect we
10:45:02 16 will have to file a motion for a mistrial to preserve the
10:45:04 17 record because to ask the jurors to consider --

10:45:05 18 THE COURT: Fine, file a motion.

10:45:06 19 MR. STOFFELMAYR: To ask the jurors to
10:45:07 20 consider the impact of their decision beyond this case is
10:45:10 21 facially improper under every standard, I believe.

10:45:12 22 THE COURT: Well, I -- that part of it is a
10:45:15 23 problem, all right? I --

10:45:17 24 MR. STOFFELMAYR: And there's no instruction
10:45:18 25 that undoes that harm.

10:45:20 1 MR. MAJORAS: Walmart joins that, Your Honor.

10:45:22 2 This is --

10:45:22 3 THE COURT: What do you want me to say? All
10:45:24 4 right? I mean, I will say again, they're not to decide
10:45:27 5 future cases; they're to decide this case, whether the
10:45:31 6 plaintiff has proved its case, these two counties against
10:45:35 7 these defendants. That is it. So I'll -- I will
10:45:41 8 reemphasize that.

10:45:43 9 MR. STOFFELMAYR: But respectfully,
10:45:44 10 Your Honor, that couldn't possibly undue the harm.

10:45:47 11 MR. DELINSKY: CVS concurs.

10:45:49 12 MR. MAJORAS: Walmart agrees.

10:45:50 13 THE COURT: All right. Overruled.

10:45:52 14 MR. WEINBERGER: Your Honor, just to --

10:45:53 15 THE COURT: But, Mr. Lanier, I am cautioning
10:45:57 16 you, you've got to stay within bounds, and that was right on
10:46:01 17 the edge.

10:46:01 18 MR. LANIER: Yes, Your Honor. I will be very
10:46:02 19 careful, and I will not --

10:46:03 20 THE COURT: And I will jump in. The next time
10:46:05 21 I'll jump in myself.

10:46:06 22 MR. LANIER: I will not get near that edge
10:46:07 23 again, Your Honor.

10:46:08 24 THE COURT: Well, I will. And I'm going to
10:46:09 25 have to tell the jury that -- figure out some way to tell

10:46:13 1 them that this is -- the only thing they're to decide in
10:46:18 2 this case is whether the two counties have proven this
10:46:21 3 particular case, public nuisance in these counties against
10:46:24 4 these defendants.

10:46:26 5 MR. LANIER: And I'll make that abundantly
10:46:29 6 clear as well, Your Honor, so they hear it from my lips.

10:46:32 7 MR. DELINSKY: Your Honor, the next issue was
10:46:33 8 the bolstering of Professor Lembke.

10:46:36 9 It is not appropriate for Mr. Lanier to get up and say
10:46:38 10 I've been trying cases for a long time.

10:46:40 11 THE COURT: You should have objected there. I
10:46:43 12 would have sustained it.

10:46:43 13 I agree, Mr. Lanier.

10:46:44 14 MR. LANIER: Okay, Your Honor.

10:46:45 15 THE COURT: You went -- I mean, obviously you
10:46:47 16 hired her and brought her in. Okay. We know that. The
10:46:50 17 same way the defendants hired their experts and brought them
10:46:53 18 in. But I don't think it's appropriate for either counsel
10:46:56 19 to essentially give testimonials for their experts.

10:46:59 20 MR. LANIER: Okay.

10:47:00 21 THE COURT: All right? So --

10:47:02 22 MR. LANIER: I will not do it again,
10:47:03 23 Your Honor.

10:47:04 24 MR. DELINSKY: All right. And, Your Honor,
10:47:05 25 moving on, I'd just like to preserve two objections that I

10:47:09 1 believe Your Honor's overruled, but I want to make it
10:47:11 2 abundantly clear.

10:47:12 3 Number one, Mr. Lanier made an argument that the
10:47:14 4 pharmacies had the choice not to sell these prescription
10:47:19 5 drugs.

10:47:19 6 I believe Your Honor determined in its -- in its
10:47:23 7 deciding evidentiary issues early on, decided that it would
10:47:28 8 not prohibit that kind of argument. But we believe it's
10:47:31 9 improper --

10:47:31 10 THE COURT: All right. Fine.

10:47:32 11 MR. DELINSKY: -- to suggest that a
10:47:33 12 pharmacist -- a pharmacy has the option of not carrying
10:47:37 13 legal medicine, and that has --

10:47:39 14 THE COURT: I don't think he said that. I
10:47:40 15 mean --

10:47:40 16 MR. DELINSKY: That's exactly what he said,
10:47:41 17 Your Honor.

10:47:41 18 THE COURT: -- obviously you don't have to
10:47:42 19 have a controlled substances license, but any pharmacy's got
10:47:46 20 to have one. So I don't think he suggested that.

10:47:48 21 MR. DELINSKY: He did, Your Honor. He said
10:47:50 22 that the pharmacies have the option of not carrying these
10:47:54 23 drugs and choosing not to carry these drugs and they do it
10:47:57 24 for profit. That's exactly what he said.

10:47:59 25 THE COURT: Well, it's technically true, but

10:48:01 1 any pharmacy -- you can put out -- you can say in your
10:48:03 2 argument any pharmacy that does that would be out of
10:48:06 3 business. And you're right. So why don't you -- you can
10:48:09 4 get up and say that in your argument, Mr. Delinsky.

10:48:12 5 MR. DELINSKY: My second objection that I'd
10:48:14 6 like to preserve, Your Honor, goes to the effective controls
10:48:17 7 against theft and diversion regulation.

10:48:18 8 Your Honor knows we disagree with Your Honor's
10:48:21 9 interpretation of that regulation. But to now read into
10:48:25 10 that regulation, which clearly on its face requires --
10:48:27 11 applies to security requirements.

10:48:29 12 THE COURT: Well, I think it's beyond that.
10:48:32 13 So, fine. You can -- you can -- you want to get up and make
10:48:34 14 that argument, you can. You can say it only -- that that
10:48:37 15 regulation does nothing more than deal with safety and
10:48:43 16 security and theft, you can say that.

10:48:45 17 MR. WEINBERGER: Your Honor, and that --
10:48:47 18 Mr. Delinsky's argument entirely contradicts the testimony
10:48:52 19 of Demetra Ashley, who was the head of diversion control
10:48:57 20 after Joe Rannazzisi. She specifically -- I asked her about
10:49:01 21 this --

10:49:01 22 THE COURT: We don't have -- we're not arguing
10:49:03 23 the case here. If Mr. Delinsky wants to make that argument,
10:49:05 24 he can.

10:49:05 25 MR. DELINSKY: And, lastly, Your Honor -- and

10:49:06 1 I understand my objection to be preserved -- there were a
10:49:10 2 few spots here, but I just want to single out one.

10:49:13 3 Mr. Lanier argued that DEA doesn't have the resources.

10:49:17 4 THE COURT: Well, that's a fact.

10:49:18 5 MR. DELINSKY: No. But, Your Honor, it's not
10:49:19 6 a fact in evidence.

10:49:19 7 THE COURT: I think it is.

10:49:21 8 MR. DELINSKY: That was not asked of
10:49:23 9 Joe Rannazzisi. It was not asked of Mr. --

10:49:24 10 THE COURT: I think there was testimony of
10:49:26 11 many of the DEA witnesses as to what they do or don't do,
10:49:31 12 so --

10:49:31 13 MR. DELINSKY: But, Your Honor, there was no
10:49:33 14 testimony about resources. The fact of the matter is that
10:49:35 15 DEA learned -- or leverages millions and millions and
10:49:39 16 millions of dollars from the registrations of these
10:49:42 17 pharmacies and every pharmacy that registers for it. They
10:49:45 18 have ample resources. There's been no testimony on any of
10:49:48 19 this.

10:49:48 20 We need to keep these arguments to what's in the
10:49:50 21 record. That was too far. That was not an inference. That
10:49:54 22 was not a fair inference from any evidence in the record.
10:49:56 23 We have --

10:49:57 24 THE COURT: Well, I think it's a fact. Okay?
10:49:59 25 But -- and I think there was -- I think there was testimony

10:50:01 1 about it. But, remember, I said it's fair game to attack
10:50:06 2 the federal government. There's a very wide strike zone.
10:50:09 3 So you want to attack the federal government, you can too.
10:50:12 4 It's fair -- it's fair game.

10:50:15 5 MR. MAJORAS: Your Honor, John Majoras.

10:50:17 6 Just two quick points. One on the issue about merely
10:50:21 7 by operating a business selling opioids, that's directly
10:50:25 8 counter to what the plaintiffs argued in Motion in Limine
10:50:27 9 Number 5 argument where they said, as a preliminary matter,
10:50:30 10 plaintiffs do not intend to argue that the pharmacy
10:50:33 11 defendants are liable based merely on the fact that they
10:50:36 12 distributed opioids.

10:50:37 13 It's Docket Number 3464, Page 15.

10:50:40 14 THE COURT: Well, all right. Mr. Lanier, you
10:50:41 15 better correct that. All right? If you -- I mean --

10:50:44 16 MR. LANIER: I don't -- first of all, I need
10:50:46 17 to look at the Motion in Limine because if it reads the way
10:50:51 18 Mr. Majoras, it dealt with distribution, and I need to check
10:50:53 19 that. But, obviously, I'm talking dispensing here, not
10:50:56 20 distribution.

10:50:56 21 THE COURT: Well, if you --

10:50:57 22 MR. LANIER: But I'll check.

10:50:58 23 THE COURT: Well, if you in any -- I think you
10:51:01 24 were right on the edge of suggesting they did something
10:51:03 25 wrong by carrying them and dispensing --

10:51:07 1 MR. LANIER: Again, no, no, no. They didn't.
10:51:10 2 They didn't at all. What I was trying to --

10:51:11 3 THE COURT: And I think you've got to make
10:51:12 4 that clear.

10:51:12 5 MR. LANIER: I'll make that clear, yeah,
10:51:14 6 because that's not my point. I don't think they do anything
10:51:15 7 wrong by that. It's a question of whether they do it
10:51:16 8 properly.

10:51:16 9 THE COURT: Well, you were very -- you were
10:51:17 10 right on the edge there.

10:51:18 11 MR. LANIER: I'll clarify that, Your Honor.

10:51:18 12 MR. MAJORAS: And, Your Honor, my final point,
10:51:21 13 this is along the lines of bolstering the expert witness.
10:51:27 14 Discussions about whether I liked a witness or not to
10:51:30 15 cross-examine them harder or less than somebody I didn't
10:51:33 16 like, that's clearly inappropriate. -

10:51:34 17 MR. LANIER: Your Honor, I understand your
10:51:35 18 ruling on that.

10:51:36 19 THE COURT: That was a problem -- Mr. Lanier,
10:51:38 20 that was a problem too.

10:51:39 21 MR. LANIER: Yeah, and understanding that in
10:51:40 22 this court, I won't do it. It was --

10:51:41 23 THE COURT: Whether you like a witness, if you
10:51:43 24 think they -- they deserve some strong cross-examination,
10:51:47 25 you make them. It has nothing to do whether you personally

10:51:50 1 like the witness.

10:51:51 2 MR. LANIER: Okay. I'll be careful about that
10:51:53 3 as well. This is -- I apologize. I -- Your Honor, it was
10:51:58 4 the same type of thing that was done in opening by
10:52:02 5 Ms. Sullivan, at least, but -- and in a lot of courts,
10:52:04 6 that's not a problem. But if that's a problem here, I
10:52:06 7 don't -- I will stay totally away from that, and I won't do
10:52:09 8 that again.

10:52:09 9 THE COURT: All right.

10:52:10 10 MR. LANIER: Thank you.

10:52:13 11 THE COURT: Okay. Anything else?

10:52:16 12 Okay.

10:52:17 13 (Recess was taken from 10:52 a.m. till 11:07 a.m.)

11:07:20 14 COURTROOM DEPUTY: All rise.

11:08:09 15 (Jury returned to courtroom.)

11:10:41 16 THE COURT: All right. Please be seated,
11:10:43 17 ladies and gentlemen.

11:10:44 18 Before -- before Mr. Lanier proceeds, I want to remind
11:10:50 19 you that your job as jurors is to decide the issues
11:10:52 20 presented in this case only. It is not to decide anything
11:10:57 21 about any future case or any other case in the country.

11:11:01 22 You will decide only whether each plaintiff,
11:11:05 23 Lake County and Trumbull County, has proved its case against
11:11:10 24 each of the three defendants.

11:11:11 25 Thank you.

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11:11:11 1 MR. LANIER: Thank you, Your Honor.

11:11:12 2 And that's exactly right. You'll -- in fact, the
11:11:14 3 judge has tailored his questions to exactly what you'll
11:11:18 4 find. And you'll read those. He read you his instructions,
11:11:22 5 but ultimately he'll also give you --

11:11:24 6 I think it's four, Your Honor.

11:11:26 7 -- but he's got a set of questions that he'll ask you,
11:11:29 8 and that narrows down the focus on what this whole case is
11:11:33 9 about in front of you today.

11:11:35 10 And so I was marching through the recap of the trial.
11:11:37 11 I had made it through Carmen Catizone, and I had gotten to
11:11:40 12 the point where we looked at our first DEA witness, and that
11:11:43 13 was Joe Rannazzisi.

11:11:44 14 Now, Joe Rannazzisi is someone we called as a fact
11:11:48 15 witness to testify about the facts relative to the DEA when
11:11:51 16 he was the head of diversion control.

11:11:56 17 He was an interesting gentleman. He testified that he
11:11:58 18 was not only at times a DEA agent and then ultimately the
11:12:02 19 director, but -- of the -- that diversion control unit, but
11:12:08 20 also a pharmacist and also a lawyer. So he brought a unique
11:12:11 21 set of background skills to his job. And we used him to
11:12:16 22 explain the legal system. Legal system, and the
11:12:21 23 requirements that are registrants, the people who register
11:12:23 24 to do this -- to sell these drugs or work in these drugs.

11:12:28 25 And so within the area of that, he explained those

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1 legal requirements, and we can look briefly at his notes and
2 get an idea of what he had to say.

3 Mr. Wilson, we will -- let's see. . .

4 All right. There we go.

5 You'll recall his experience. It was pretty full. He
6 had a lot of DEA experience. We walked through all of that.
7 We explained all of that.

8 But then I started asking him about the corporation's
9 responsibility, in a sense as the head of the octopus with
10 all of the different stores that could report under that.

11 And then we asked him specifically about what he
12 understood the obligations to be for dispensers, for
13 pharmacies. He talked about red flags. He explained that
14 if there are red flags, you must resolve each one. It might
15 start with a phone call to the doctor, but you could also
16 use your -- you also used your professional judgment. If
17 there was a potential problem with the prescription of
18 distance, dosing, traveling in pairs, same people, and so
19 many more, then those red flags needed to be resolved. And
20 he explained that.

21 He explained documentation, that there must be
22 documentation somewhere. It was expected at the DEA. Could
23 be in the patient profile, but somebody might come back and
24 need that documentation later.

25 He explained the knowing requirement, very much using

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1 language akin to what His Honor has already read to you this
2 morning. Knowing or having reason to know, he said, has
3 been clear since 1990, and you can't turn a blind eye.

4 He talked about the percentage testing, if it's
5 80 percent non-controlled to 20 percent controlled or less.
6 And we know in this case that it's less for these pharmacies
7 because they're doing a whole lot of non-controlled business
8 as well. And he says that the DEA looked at the
9 percentages, but that wasn't the end-all. That's not a
10 get-out-of-jail free card, you know, or Monopoly, go to --
11 advance token to wherever. It's not an automatic move.
12 It's just one of the things looked at.

13 Corresponding responsibility he talked about when
14 presented with prescription, that some of them are going to
15 have red flags, and the pharmacist must resolve those red
16 flags before dispensing.

17 And then lastly, he talked about the pharmacy and the
18 pharmacist. And he talked about how the pharmacy is the
19 registrant and is responsible. The pharmacist conducts the
20 business of the pharmacy. And so the pharmacy supplies the
21 drugs, the computers, the reference materials. And the
22 pharmacist is responsible to practice, and the pharmacy is
23 responsible for what the pharmacist does.

24 So we got that from Joe Rannazzisi. He came in and he
25 testified, and he made it real clear about these various

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11:15:29 1 issues.

11:15:29 2 Juan, if we go back, please.

11:15:31 3 He also was the gentleman who actually issued show
11:15:35 4 cause orders. I mean, he put them out under his signature.
11:15:39 5 He oversaw legal investigations that you've heard about in
11:15:43 6 this case, and he was emphatic that the pharmacies are
11:15:47 7 responsible for the actions of the pharmacists. Can't turn
11:15:50 8 a blind eye to red flags. Must resolve the red flags before
11:15:54 9 you distribute, et cetera. And then used this line, that
11:15:58 10 the pharmacies are the last line of defense, the last line
11:16:03 11 of defense before these prescriptions go out and go forth.

11:16:09 12 And so within the framework of that we had his
11:16:11 13 testimony, and then we followed it with a Walgreens pharmacy
11:16:15 14 supervisor from Trumbull County, Brian Joyce.

11:16:18 15 Now, Mr. Joyce is one that was done, his examination
11:16:23 16 was done by Mr. Weinberger. And Mr. Weinberger asked him
11:16:28 17 some pretty clear questions. In the process though, let's
11:16:32 18 remember who he was. He was someone who testified that
11:16:36 19 every pharmacist in Ohio knows about the epidemic. He also
11:16:41 20 admitted that an oversupply of pills can lead to diversion.

11:16:46 21 See, that's one of these questions is, do they know or
11:16:49 22 have reason to know? Is it foreseeable for causation? And
11:16:53 23 he certainly gives us that as to Walgreens, at least. But
11:16:58 24 he speaks of it in a way that should put everybody on
11:17:02 25 notice.

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1 He says, I never saw the need to review dispensing
2 reports. So he didn't actually look intensely at the
3 reports of the people he was supervising for Walgreens.
4 Instead, what he says is, yeah, you know, we were
5 dispensing, and Dr. Veres, okay, every pharmacist in
6 Trumbull knew of Dr. Veres for decades. And, yet, they're
7 doing what they're doing.

8 And he would say, well, I was okay because I was doing
9 a walkthroughs. And my walkthroughs were adequate. And his
10 walkthroughs were interesting. It was the first time that
11 we -- Mr. Weinberger and I were cognizant of the idea that
12 he had on his computer notes from the walkthroughs that he
13 was routinely doing at all the pharmacies to check to make
14 sure that the pharmacists were doing their jobs right.

15 And so we got those computer notes in the middle of
16 trial, and you got a chance to see them. They were
17 basically four notes, one in January 18th of 2019,
18 January 4th of 2019, the 15th and 16th, and July 30th. And
19 none of them, none of them talked about how the pharmacists
20 were fulfilling their obligations, whether they were doing a
21 good job for a bad job.

22 So we were left with him. And he answered a number of
23 questions that Mr. Weinberger put to him about -- let's look
24 at a couple of these. The Target Drug Good Faith Dispensing
25 checklist. Now, this was the checklist, you'll recall,

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11:18:57 1 Amy Stossel, the pharmacist for Walgreens at the end, didn't
11:19:00 2 even know really how to fill out. She thought everything
11:19:03 3 was supposed to be checked no. And then she thought it was
11:19:07 4 supposed to be half yes, half no. And then when it was
11:19:10 5 pointed out to her they should all be yes, which is rather
11:19:15 6 provocative in itself.

11:19:16 7 But he testified that the Target Drug Good Faith
11:19:22 8 Dispensing checklist was Walgreens' method of documenting
11:19:24 9 the resolution of the red flags, which makes it really
11:19:27 10 interesting that the pharmacist they picked to come in here
11:19:31 11 doesn't know how to do it.

11:19:37 12 He says, if a Target Drug Good Faith Dispensing
11:19:40 13 checklist was not completed for an oxycodone prescription,
11:19:43 14 the policy was violated. And yet we had a box of refusals
11:19:47 15 to fill. We had a chance to try to see -- and at least a
11:19:50 16 couple of the examples we pulled out didn't have the Target
11:19:53 17 Drug Good Faith Dispensing, as I pointed out.

11:19:57 18 The Target Drug Good Faith Dispensing checklist was
11:20:00 19 not used to resolve red flags for hydrocodone.

11:20:08 20 The most prescribed opiate wasn't even listed by name.
11:20:13 21 It would have to come under the other category on their
11:20:16 22 Target Drug Good Faith Dispensing checklist.

11:20:19 23 And these were things he agreed to. He agreed it
11:20:23 24 would be unlawful to fill a prescription that triggered a
11:20:26 25 red flag without requesting and reviewing an OARRS report.

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11:20:32 1 That's certainly been the law in Ohio under certain
11:20:35 2 conditions since 2011.

11:20:38 3 Let's keep moving on. That was our first real taste
11:20:48 4 of the perspective that was brought by Brian Joyce. And
11:20:53 5 we'll get to more of this in a moment.

11:20:55 6 But if we go back to the PowerPoint, at this point we
11:21:01 7 called Dr. McCann, Craig McCann, to the stand.

11:21:06 8 Now, Dr. McCann is the numbers' guy. And they took
11:21:08 9 that massive set of ARCOS data, that massive database that
11:21:13 10 the DEA keeps, and plugged it into massive computers to
11:21:15 11 figure out and ultimately set up a database that anybody
11:21:18 12 could use to access this information, assuming you had the
11:21:21 13 right to access it.

11:21:22 14 And so within the framework of that, he's the data
11:21:25 15 expert that all the other data experts relied on. They
11:21:30 16 didn't like the way he did the computations on the red
11:21:34 17 flags, but in terms of how many pills were being put out,
11:21:39 18 everybody goes to his data. And he gave the number of pills
11:21:43 19 per person, per defendant in these counties per store per
11:21:47 20 year. And you'll have that document back there. It's one
11:21:55 21 that you will have seen, you'll remember. It's a pretty
11:21:58 22 easy document to look at.

11:21:59 23 Here is the Walmart example. Walmart. He's got the
11:22:04 24 first page of dispensing of eight prescription opioids, and
11:22:10 25 it talks about how many average dosage units per capita were

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1 dispensed by Walmart within that time frame. And then he
2 breaks it out and he talks about how Walmart, in this
3 example, dispensed oxycodone and hydrocodone by year.

4 And in Lake and Trumbull Counties, if you add them
5 together, or if you break them apart, you'll see it started
6 out at 1.26 per year in 2006. It peaked in 2014 -- no, 2015
7 at -- no, 2016, at 3.22 pills per person. Every man, woman,
8 child, infant, everybody, getting those pills just from
9 Walmart stores alone.

10 He didn't only give you Walmart figures, he also gave
11 you figures for the other defendants as well. And so you
12 can look at those other defendants, and you can see the CVS
13 numbers and the Walgreens numbers, for example.

14 CVS, you've got the same basic layout of the front
15 sheet, as you'll look at it in the exhibits, but then you've
16 got it by year. CVS peaked in 2013 -- no, 2012 at 8.66
17 tablets, pills, per person, per year. Just from those
18 stores. It's not counting all the other pharmacies that are
19 putting out drugs. And so you've got that, and you've got
20 it broken out into Lake County and Trumbull County.

21 In Lake County you've got that year, 10.92 dosage
22 units per person in Lake County.

23 And then you've got 6.18 in Trumbull County.

24 So you've got that. You can also look at it broken
25 out by stores so you can see which stores were really

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1 putting out the numbers, and that becomes relevant later on.

2 So all of these pills were being put out there by CVS,
3 they're being put out there by Walmart, and they're being
4 put out by Walgreens as well. And so we gave you proof of
5 the Walgreens numbers. And the Walgreens numbers are very
6 much aligned with the others.

7 You will see they peaked in 2011 at 10.23 pills per
8 person. They were much heavier in Trumbull County where
9 they were 10.87 that year, and 2014, they were 10.92. 2015,
10 they hit 13 pills per person in Trumbull County.

11 No one challenges the math on this. It's the math.
12 It's 2 plus 2 is 4. That's how much they were selling.

13 And their argument is, yeah, but compare us to others.
14 Okay? Well, I don't know -- you know, I -- Rachel is one of
15 my five kids, one of our five kids -- sorry, Becky -- and it
16 was never a good excuse to say, well, I may be misbehaving,
17 but someone else did too. I'm not focusing on anybody else
18 right now. I'm focusing on these three pharmacies that
19 won't admit they did anything wrong. That's who I'm
20 focusing on. I'm not worried about the others.

21 And so these three pharmacies, they can't escape their
22 behavior by saying, okay, well, but we spread ours out among
23 11 stores, and if you don't add all of our stores together,
24 we don't look like we put out as many as some of the other
25 stores did. No, that doesn't work.

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11:26:02 1 And so we get that explanation from Dr. McCann. He
11:26:05 2 not only did that, but he also then explained the
11:26:07 3 ramifications of Carmen Catizone's findings on red flags.

11:26:12 4 So you've got his findings on red flags where the best
11:26:16 5 he could say about documentation is what he said for
11:26:20 6 Walmart. I think for Walmart he said that 90 percent or so
11:26:22 7 had some level of documentation, but he found the
11:26:25 8 documentation inadequate. And then he looked at the others
11:26:28 9 and he found the others much worse in terms of where they
11:26:32 10 were just missing data, just totally missing. And then what
11:26:36 11 Dr. McCann did is he said based mathematically on that
11:26:41 12 representative sample, you can make a determination that
11:26:44 13 this is a problem that spanned those 10 years, that it's a
11:26:48 14 fair and legitimate thing to say that in a random sampling,
11:26:53 15 we didn't just happen to get something that would not make
11:26:58 16 sense.

11:26:58 17 So within the framework of that, we then put
11:27:00 18 Brad Nelson on the stand. Now, Brad Nelson was interesting.
11:27:03 19 He first testified by a deposition that I took, and we
11:27:07 20 played the deposition. And later on His Honor allowed us to
11:27:09 21 call him by video hookup, and he was at his law -- lawyer's
11:27:13 22 office in Dallas, Texas.

11:27:16 23 And he used to work for Walmart. He was a former
11:27:19 24 senior manager of controlled substance and regulatory
11:27:21 25 affairs. He's the one whose job application said, when he

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1 was applying to get that position, it said that the job
2 would be one to drive compliance. And yet if you look at
3 his experience, he didn't really have any compliance
4 experience in terms of driving compliance to meet
5 regulations.

6 He was unaware of the *Holiday* case. One of the
7 seminal cases. He's the one who sent out that e-mail that
8 said, in essence -- I've synopsized it here -- emphasized
9 sales over complying with the 2011 MOA. Walmart had entered
10 into a memorandum of understanding with the DEA that said,
11 we will do A, B, C, D, E, F, G, for the next X years. And
12 when it was almost up, the stores were asking, or at least
13 one store had the question of do we need to be doing this,
14 and he's the one who sent the e-mail out that said the MOA's
15 almost up. Right now your energy and your efforts are
16 better spent, in essence, driving sales. And so we got that
17 from him. He came back and testified live later, but that
18 testimony is absolutely devastating for Walmart.

19 The idea -- if you'll recall his testimony -- if we
20 can go over here for a moment. This is the timeline that we
21 did with him. He put his timeline up -- or I put this
22 timeline up through him, and we talked about how he took his
23 job. But we talked about how *Holiday* was written up in the
24 Federal Register in 2012. And we talked about how they had
25 the no blanket refusals to fill but how in 2013, there was a

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11:29:11 1 concern that was being expressed by others that Walmart was
11:29:15 2 becoming a funnel in certain parts of the country for bad
11:29:19 3 prescriptions that were being filled there.

11:29:22 4 You know, he continued to do this work until he
11:29:30 5 finally was reassigned or quit. But he was just absolutely
11:29:37 6 not qualified do the work by any stretch of the imagination.
11:29:43 7 And, frankly, he's the one who kept cut and pasting all of
11:29:46 8 his comments about what needed to be done or what didn't
11:29:49 9 need to be done. And so we had his testimony next.

11:29:53 10 Juan, if we go back, please. Thank you.

11:29:55 11 He also testified that when the registered pharmacists
11:30:00 12 expressed their fears and concerns about filling certain
11:30:03 13 prescriptions, he would just cut and paste that language
11:30:05 14 that said, oh, we're not allowed to do a blanket refusal to
11:30:09 15 fill.

11:30:11 16 We really pressed him on that. Finally we found one
11:30:14 17 of their witnesses who said that she talked to two or three
11:30:16 18 or four Boards of Pharmacy, and nobody ever documented it,
11:30:19 19 but they said that you can't do a blanket refusal to fill.

11:30:24 20 I said, okay, well, has it ever been written down?

11:30:27 21 No.

11:30:27 22 And then y'all just started doing it?

11:30:30 23 Yes.

11:30:30 24 Did you ever talk to anybody in Ohio?

11:30:32 25 No.

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11:30:33 1 And then we find in trial that there was an issue up
11:30:37 2 in Wisconsin or Michigan -- Wisconsin, but even that issue
11:30:43 3 wasn't a blanket refusal to fill for a doctor, it was for an
11:30:46 4 entire clinic. And there were some overlying facts that
11:30:51 5 were unknown to anybody to talk about in that.

11:30:53 6 So we have this from him. And he's the one who kept
11:30:56 7 the fill on even when Walmart was labeled a funnel for
11:31:01 8 C-IIs.

11:31:01 9 We then turned county specific to Trumbull County, and
11:31:05 10 we put Captain Tony Villaneuva on the stand. Now,
11:31:10 11 Captain Villanueva was a sheriff's captain, or is a
11:31:15 12 sheriff's captain. He was former commander of the opioid
11:31:18 13 task force. And when he took the stand, he talked about the
11:31:18 14 effect of the epidemic in Trumbull County on courts, on
11:31:22 15 children, on crime, and on the community.

11:31:27 16 Because one of the things the judge has us -- we're
11:31:29 17 required to prove is that there is an epidemic that has
11:31:33 18 caused a public nuisance in each of these counties.

11:31:37 19 And so he talked also about some of his investigation
11:31:40 20 work. And he talked about how he investigated using OARRS.
11:31:45 21 And he would find prescriptions that had been filled for
11:31:48 22 people who were specifically diverters by all three of the
11:31:54 23 pharmacies that were here.

11:31:55 24 Now, I say that. I believe on that particular
11:31:58 25 prescription we were looking at, Walmart dispensed one of

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11:32:02 1 the trinity drugs and not an actual opiate, if I'm
11:32:05 2 remembering it correctly. But it's still there in OARRS
11:32:08 3 because it would be in there.

11:32:09 4 We then went to Walgreens senior director of
11:32:14 5 divisional, vice president for pharmacy compliance,
11:32:19 6 Natasha Polster. She is the erase the notes lady.

11:32:21 7 She's the one who thought that the opioid epidemic
11:32:24 8 crisis problem really started in 2011, and yet has no
11:32:30 9 trouble saying delete the notes fields if the need is there.
11:32:35 10 Need being, not something simply malicious, but just, hey,
11:32:38 11 we need more room in the notes fields and there's a certain
11:32:42 12 number of characters. That need.

11:32:44 13 She's the one who testified about that refusal to fill
11:32:48 14 box, but hadn't really looked into it. And when I pulled
11:32:52 15 out some of the refusals to fill and showed the
11:32:56 16 inadequacies, she was kind of like, well, I didn't really
11:32:59 17 look at the box. It was just put here.

11:33:02 18 She's also the one who put some changes in. She
11:33:06 19 changed the size of the screens, but it was all slow motion
11:33:11 20 changes. Takes years to change. You know, a good example
11:33:18 21 of that is what she had to say -- in the interest of time,
11:33:26 22 I'll keep going. If I have time, I'll do it in rebuttal,
11:33:29 23 but I want to get to the next witness.

11:33:31 24 The next witness was Caleb Alexander. Caleb
11:33:35 25 Alexander. Now, he's a doctor, he's a medical doctor. But

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11:33:37 1 he's also, in addition to a medical doctor who sees
11:33:40 2 patients, he's a pharmacoepidemiologist at Johns Hopkins.

11:33:45 3 So here he is. He specializes in doing
11:33:52 4 pharmacoepidemiology. I mean, this is his niche. He deals
11:33:54 5 with patients who have opioid issues. He prescribes opioids
11:33:58 6 on a limited basis. He knows when to use them and when not
11:34:02 7 to.

11:34:02 8 He's got a massive CV with over 300 articles. He's
11:34:07 9 been relied on by the government. He's been relied on by
11:34:11 10 academia. We brought him to you. We set him before you.
11:34:15 11 And he confirmed the epidemic in the counties and confirmed
11:34:19 12 that it was caused by an oversupply of fills.

11:34:23 13 We've got to prove causation. We've got to prove that
11:34:27 14 these three pharmacies were causative to substantial aspect
11:34:34 15 of -- or damage within this nuisance. And so he's one of
11:34:40 16 our witnesses who did it. Then he laid it out there and
11:34:43 17 explained that when you have an oversupply of pills, this is
11:34:47 18 what's going to happen.

11:34:49 19 Now, he's not the only one. I'll come back and look
11:34:52 20 at some of these PowerPoint slides in a little bit when we
11:34:55 21 get to the charge -- or to the judge's instructions, but I
11:34:57 22 want to go to Dr. Kerry Keyes first.

11:35:02 23 Dr. Kerry Keyes is the epidemiologist at Columbia who
11:35:07 24 wrote the textbook on epidemiology used by so many schools
11:35:11 25 when they teach it. She had been dealing with the opioid

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11:35:14 1 tragedy for over two decades, or right at two decades, since
11:35:18 2 the early 2000s. She actually did it as a volunteer in
11:35:22 3 another occupation as she went to school to get her Ph.D. in
11:35:25 4 epidemiology so that she could address these types of
11:35:29 5 issues.

11:35:29 6 And she's the one who explained the three phases of
11:35:32 7 the epidemic. They're written up in other places. You can
11:35:35 8 find them in PowerPoints and articles and things, but she
11:35:38 9 explained them to us here in the courtroom. And then she
11:35:40 10 also gave the national numbers and the local numbers so that
11:35:45 11 y'all would have those numbers in front of you to look at
11:35:48 12 and assess.

11:35:49 13 I'll deal with her PowerPoint slides in a little bit,
11:35:54 14 but I want you to remember that she explained why the
11:35:56 15 epidemic is sourced to the oversupply of prescription pills
11:36:00 16 and not the general misery of the community.

11:36:03 17 You may have been thinking, that may have even just
11:36:06 18 flown by you when she said that. Like, why does that
11:36:09 19 matter? The reason it matters is I knew they were going to
11:36:11 20 call Miller, Dr. Miller. He was the Chicago economist.

11:36:18 21 MR. WEINBERGER: Murphy.

11:36:19 22 MR. LANIER: Murphy. I've heard it both ways.

11:36:22 23 They were going to call Murphy the economist from
11:36:26 24 Chicago.

11:36:26 25 Thank you, birthday boy.

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11:36:29 1 And they were going to bring him in, and he was going
11:36:31 2 to say, oh, don't blame the oversupply of opioids. Just say
11:36:35 3 the community is miserable. Just say it's, you know, if it
11:36:41 4 wasn't opioids, they'd be doing something else. It's just
11:36:43 5 the status of the community.

11:36:46 6 And so I asked her that. And I had her explain ahead
11:36:49 7 of time why that's not true. And she put up this chart, and
11:36:53 8 she compared it to the United States and showed how the
11:36:57 9 rates of opioid overdose deaths, sales and treatments from
11:37:01 10 1999 to 2010, all follow the same path. It's not just in
11:37:09 11 Northeast Ohio. It's not just misery there.

11:37:16 12 Then we put on the stand Brad Nelson. And this was
11:37:18 13 the -- our chance to put him on live. So he came back for a
11:37:23 14 second time.

11:37:24 15 He's the guy who did the registered pharmacist cut and
11:37:27 16 paste answers, who kept the fill on even when they were
11:37:31 17 labeled a funnel. I've covered his testimony. I won't
11:37:33 18 rehash it.

11:37:34 19 After him, we put on Michelle Travassos. Now, she was
11:37:39 20 a deposition. And you guys were paying great attention
11:37:42 21 during that deposition. But I hope you remember the fact
11:37:45 22 that she knew of the DEA's enforcement action. She knew, as
11:37:51 23 a CVS professional services manager, about that enforcement
11:37:55 24 action in Florida. She was the one who helped -- and was
11:38:00 25 involved in the WaVe 2.0. WaVe 2.0 was going to be their

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1 computer system to help identify red flags, and initially
2 they had, like, 27 red flags and it would label -- and it
3 would flash them and they -- you know, you listen to the
4 testimony, and you just walk away thinking, all that flashed
5 way too many red flags for them, so they scaled it down to
6 three red flags that their computer will identify. And it's
7 still not in place all over, still not working fully. But
8 she talked about that.

9 She agreed that diverted opioids are a public health
10 risk. So again, we've got CVS agreeing to this. I think
11 all of the defendants without any question have all agreed
12 that it's a public health risk.

13 She knew about Dr. Veres and Dr. Torres, who in one
14 store alone were supplying 70 to 80 percent -- this is one
15 of our county stores -- 70 to 80 percent of the store's
16 prescriptions for hydro.

17 She talked about the RX Connect program, which was to
18 provide realtime assistance for red flags, but it was paused
19 in 2013 for reasons she didn't know.

20 She talked about the algorithm that would ID stores
21 with risky dispensing habits in Trumbull, the stores that
22 were filling too many prescriptions for Torres and Veres but
23 had no knowledge of anything that was done.

24 Then we looked specifically at Trumbull County in some
25 greater detail. We put April Caraway on the stand to

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11:39:41 1 testify. She's the executive director of the Trumbull
11:39:44 2 County Mental Health & Recovery Board. She testified that
11:39:46 3 2017 was the worst year ever with 135 overdose deaths.
11:39:52 4 1,250 overdoses, and she said this year's on track to be
11:39:57 5 worse.

11:39:58 6 And this becomes important because one of the judge's
11:40:00 7 instructions is a question of whether or not there's still a
11:40:03 8 nuisance today. And there's no question but that there is.

11:40:05 9 She fights this epidemic daily. She does it with
11:40:09 10 education. She does it with treatment. She does it with
11:40:13 11 drop boxes, Detera bags, counseling.

11:40:16 12 Remember, she was asked even -- by y'all, one of you
11:40:19 13 asked her, is this the kind of thing where you have to be a
11:40:21 14 member of the -- or a citizen, a resident of the county to
11:40:25 15 benefit from some of the treatment options?

11:40:27 16 She said absolutely not. We don't turn anybody away.
11:40:31 17 And they're trying desperately to try and help this problem
11:40:35 18 everywhere they can.

11:40:36 19 So we had her testimony here.

11:40:38 20 In addition to that, we had Kim Fraser come in from
11:40:42 21 Lake County. Ms. Fraser is sitting here today. She's the
11:40:45 22 executive director for the Lake County ADAMHS Board, and
11:40:47 23 she's worked as a licensed professional counselor for over
11:40:50 24 30 years in Lake County.

11:40:51 25 Thank you for all the good that you've done. We

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11:40:53 1 appreciate it, Ms. Fraser.

11:40:54 2 But she also testified about the effect that the
11:40:58 3 opioid epidemic's had on the EMS, on fire, Children's
11:41:02 4 Services, county health department, local businesses and
11:41:04 5 more.

11:41:05 6 She's talked about the baby issues where there are
11:41:08 7 over a hundred grandparents that have become primary
11:41:11 8 caregivers and they're having to teach them how to do that.

11:41:16 9 We've got 8 grandkids, and we are really good for a
11:41:21 10 day or two. It gets -- we got too old to do that parenting
11:41:28 11 thing all over again. But you've got over a hundred
11:41:31 12 grandparents that have had to step in. And there's --
11:41:34 13 that's a community harm.

11:41:37 14 So at that point in time, we rested and the defense
11:41:40 15 started putting on their case. And who did they call?

11:41:42 16 They called Theresa Toigo. And this was a deposition
11:41:48 17 that they played. She was an associate director of the drug
11:41:51 18 and safety operations at the FDA. And I'm still a bit
11:41:53 19 puzzled. The FDA doesn't oversee chain pharmacies. They
11:41:57 20 don't over say chain pharmacists. She didn't have any
11:42:00 21 opinions on the responsibilities or the actions of
11:42:02 22 pharmacies. And the FDA itself is limited in what they can
11:42:05 23 do once a drug is approved. So she's not in a position to
11:42:08 24 really offer much except that the FDA approved these drugs.

11:42:11 25 And then they called George Pavlich. Now, I tried to

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1 find a better picture of dear Mr. Pavlich. But because he
2 was appearing by video, the judge does not allow us to do
3 screenshots, so I couldn't get a picture of him like that
4 (indicating). So I just went on the internet, and frankly,
5 having listened to him testify, I don't think he'd be
6 bothered too much by that picture. So I'm throwing it up
7 there so you'll remember who he was. But he hasn't been
8 hands-on in a decade. He's a long-time retired fellow.

9 And he basically testified that the Ohio Board of
10 Pharmacy, when he was one of their investigators, they had
11 limited resources, they did limited reviews, and they got
12 limited insight. And that's just the bottom line.

13 He did affirm that there are some bad doctors. And he
14 didn't know about the particular filings of any of the
15 pharmacies. He was kind of unknown on that kind of stuff.
16 But, even within the framework of that, he was able to say
17 that -- he's the one who did the Overholt's Pharmacy. But
18 he did it off of a tip. Even though he says that he would
19 be inspecting these pharmacies routinely, he never picked up
20 on Overholt's until he got a tip. So his routine
21 inspections never picked up on a problem pharmacy. And that
22 tells you the level of the limited review that they were
23 doing.

24 And then the defendants called, from the pain clinic
25 doctor in California, Dr. Robert Wailes. This is a guy

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11:43:45 1 who's charging almost \$1,400 an hour. He's the fellow that
11:43:51 2 was set up by a witness service that specializes in jury
11:43:56 3 persuasion and things like that. And he comes out here, and
11:44:00 4 he basically spends almost a day trying to convince you that
11:44:06 5 everybody ought to be writing opioid prescriptions, and even
11:44:08 6 the trinity, because it's so important, and he does it
11:44:13 7 routinely, and you just got to make sure that your patients
11:44:16 8 are okay.

11:44:19 9 He was the one who was asked by one of you, did -- how
11:44:24 10 many of your patients have been addicted or dead?

11:44:28 11 And his replay was, in essence, I don't know.

11:44:32 12 And this -- this guy, this is the fellow who, on
11:44:36 13 cross-examination, I pointed out that his CV seems to be
11:44:40 14 inaccurate, that he swore under oath in his deposition that
11:44:44 15 he'd written an article when he hadn't written it, he was an
11:44:48 16 investigator. That his CV says that he's board-certified by
11:44:51 17 an entity that doesn't even exist anymore, but he doesn't
11:44:54 18 list it as a former board certification. This guy's just a
11:44:58 19 pain clinic doctor who writes a bunch of opioid
11:45:01 20 prescriptions, and he's coming in here trying to defend what
11:45:04 21 he's doing there.

11:45:07 22 And, you know, he tried to testify about red flags,
11:45:11 23 but he didn't understand red flags. He didn't understand
11:45:13 24 the duties of a pharmacist or a pharmacy. Well, you just
11:45:19 25 end up with, he's got a high percentage opiate pain center

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11:45:25 1 with addicts, he admits, addicts, and others, regularly
11:45:29 2 getting opioids. That was their counter to Dr. Lembke.

11:45:32 3 And I said to him -- you know, he kept saying I'm not
11:45:34 4 an ivory tower doctor, as if Dr. Lembke is an ivory tower
11:45:40 5 doctor. She sees patients routinely. She he's clinic days
11:45:45 6 multiple days a week.

11:45:46 7 He says, but I'm spending all my time treating
11:45:48 8 patients, that's why I don't write articles.

11:45:51 9 I was like, well, wait a minute. They're talking
11:45:53 10 about your golf game at the opioid manufacturers, you got
11:45:57 11 time for that. And you got time to be the delegate for the
11:46:00 12 pain clinic people. And you got time to attend all these
11:46:03 13 meetings. And you got time for -- you know, you're telling
11:46:06 14 us that your time with the California Medical Association is
11:46:08 15 going to take 20 percent, 30 percent of your time. You have
11:46:12 16 time. You just choose not to.

11:46:14 17 Oh, yeah, maybe.

11:46:15 18 And then, we had the DEA section chief of reporting,
11:46:19 19 Stacey Harper-Avilla, and she talked about how the DEA
11:46:25 20 controls quotas for opioid manufacturing. There's no fuss
11:46:28 21 about that. We said the same with Joe Rannazzisi, that the
11:46:32 22 DEA considered abuse and diversion. No fuss about that.

11:46:34 23 You may decide, the defendants may point out, that the
11:46:37 24 DEA's got some responsibility for the opioid crisis because
11:46:41 25 they approved too high a quota. Now, they may have. I

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11:46:45 1 don't know. But that does not excuse whether or not the
11:46:49 2 pharmacies -- you can't just point the finger at everybody
11:46:52 3 else. You have to address your own conduct.

11:46:55 4 And so with Walmart, that was done when Susan Hiland
11:47:00 5 came to testify as the senior director, safety organization
11:47:03 6 of pharmacies. Now, she's the one who testified that
11:47:07 7 they -- Walmart only made these changes to their POMs, their
11:47:13 8 pharmacy operation manual, after they entered into an
11:47:18 9 agreement with the DEA. We're in phase 2 of the epidemic.
11:47:23 10 And not only that, then it still took them two years to do.

11:47:28 11 I asked her about cases from, like, the phase 1 of the
11:47:31 12 epidemic. What about the *East Main* case? She wasn't even
11:47:35 13 aware of it and all that it had to say about this and what
11:47:39 14 the company should be doing.

11:47:41 15 I asked her on the -- what about the Ohio blanket
11:47:44 16 refusal to fill, you know, position, and what are the Ohio
11:47:49 17 policies? She didn't know. She didn't have a clue. Never
11:47:52 18 checked into that.

11:47:54 19 She came and she testified not knowing that their
11:47:58 20 company, Walmart, did not allow their pharmacists to access
11:48:02 21 OARRS for years. They only allowed them to access it once
11:48:07 22 it became mandatory. When Ohio changed and made it
11:48:12 23 mandatory, that's when all of a sudden Walmart changed their
11:48:17 24 policies. But they were still having problems with their
11:48:20 25 system as of 2018. They -- you know, they never specified

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11:48:26 1 rules on the trinity combos and how they treat those until
11:48:30 2 post-2015.

11:48:35 3 And so we get Walmart's -- you know, this is all with
11:48:38 4 a legal obligation on this stuff to prevent diversion, to
11:48:43 5 have systems in place.

11:48:43 6 We have the Ohio Board of Pharmacy fellow, Trey
11:48:48 7 Edwards, and he came -- and he doesn't have the beard now
11:48:50 8 and so you might remember him unbearded -- but he was a
11:48:55 9 former agent with the Lake County Narcotics agency whose
11:48:59 10 wife is a pharmacist, and he came and he testified. And he
11:49:04 11 said that the investigations they would do of these
11:49:06 12 pharmacies were years apart, and they were just a quick
11:49:10 13 snapshot of what was going on.

11:49:13 14 Don't let the pharmacies tell you we got a clean bill
11:49:17 15 of health so we were doing everything fine. This is not
11:49:20 16 something where he never reviewed their corporate policies.
11:49:22 17 He never reviewed the volumes they were dispensing. He
11:49:27 18 never reviews their refusals to fill. So he gave you a very
11:49:30 19 limited snapshot of what it was.

11:49:31 20 And then we went to the vice president at Charles
11:49:35 21 River Associates. Now, Charles River Associates is where
11:49:39 22 they got a number of their experts.

11:49:40 23 But Brunner is the guy who relied on Craig McCann for
11:49:44 24 his data. He didn't understand how prescriptions worked
11:49:49 25 with red flags. Just wasn't his niche. He was brand new to

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opioid litigation when -- opioid issues when he came into opioid litigation. Millions of dollars later, he comes to testify, but really he doesn't have anything to add to the equation.

We had CVS Nicci Harrington take the stand, Nicole Harrington. Now, she was someone who was a senior director, or is a senior director of pharmacy services. Her area should be exactly what we're dealing with in this case, and yet she was unaware of cases other than *Holiday* and *East Main*, even though she was a pharmacist during the *Medicine Shoppe* days of 2008 and some of these other cases.

She knows about *Holiday*, heavens, she ought to because she got her job because of that case. There was such a problem within CVS, they created a new job for her to try to fix this.

CVS, the corporate, agreed to settlement terms in the *Holiday* case, and the corporation agreed to the settlement terms for the entire corporation throughout the United States.

And she became a new job within CVS to deal with these problems at that point in time, but even as she talked about what they'd been doing is they had changed their screen sizes over the years, she had to agree that the actions could have been taken years earlier. That screen could have been smaller during phase 1 or phase 2.

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11:51:22 1 She said that she was unaware that between 2006 and
11:51:26 2 2009 CVS dispensed over 10 million pills into these two
11:51:30 3 counties, over 10 million pills in that 4-year stretch. She
11:51:38 4 wasn't aware of it. Didn't know about it.

11:51:41 5 You know, she knew about the 2014 listing of red flags
11:51:45 6 but agreed it could have been done earlier. She couldn't
11:51:48 7 give us a reason it couldn't, I should say.

11:51:51 8 She's the one who had the PowerPoint in 2015 that says
11:51:54 9 we were naive to think we were doing all we could. And when
11:52:00 10 I probed her on this, her reaction was, well, when I said we
11:52:03 11 were naive to think we were doing all we could -- you'll get
11:52:06 12 this exhibit back there -- she meant -- she said, I meant
11:52:10 13 the community. Even though this is a PowerPoint not for the
11:52:15 14 community, this is a PowerPoint about the community and the
11:52:20 15 responsibility of the companies in their communities.

11:52:24 16 So you look at it, and this is the one where she said,
11:52:30 17 when I started to really understand the tremendous growth of
11:52:34 18 the misuse of prescription drugs, I realized I may have been
11:52:36 19 naive to believe we were doing everything we could to reduce
11:52:39 20 the growth of this tragic problem.

11:52:43 21 This is her tragic problem, how many popping pills are
11:52:47 22 hurting people, how many it's killing. This is her
11:52:49 23 PowerPoint. And she says, well, when I said we, I meant the
11:52:52 24 community. But you look at her we's in here, and all too
11:52:58 25 often her we's are CVS.

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11:53:02 1 Let's join together and really make a difference.
11:53:04 2 Where do we start? This is we. This is her CVS
11:53:12 3 presentation. This is a presentation that's not to the
11:53:14 4 community; this is a presentation that talks about DEA
11:53:18 5 regulations that require a controlled substance prescription
11:53:22 6 be issued for legitimate medical purposes. This is one that
11:53:26 7 says pharmacists fail to satisfy this legal requirement when
11:53:28 8 they knew or should have known a prescription wasn't used
11:53:32 9 for a legitimate medical purposes. Pharmacists cannot be
11:53:37 10 willfully blind.

11:53:44 11 This is about pharmacy. This is about CVS, the we
11:53:47 12 here. This is about what CVS is doing, their new red flag
11:53:51 13 approaches that should have been done years and years
11:53:54 14 earlier.

11:53:55 15 So -- thank you.

11:53:57 16 So as we go through here, then they put on
11:54:04 17 Kevin Murphy. This is the fellow that is from Chicago.
11:54:06 18 This is the fellow who has no real opioid experience, other
11:54:09 19 than the \$2 million his group received for their litigation
11:54:12 20 work. He's an economist. And he's the one who said
11:54:17 21 prescription opioids weren't the problem, it was the misery
11:54:20 22 in Northeastern Ohio.

11:54:26 23 That was offensive to a number of my clients and
11:54:29 24 others, I think, as I pointed out in cross-examination of
11:54:32 25 him.

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11:54:37 1 And then after that we had Dr. William Choi. That is
11:54:40 2 a data analyst hired by CVS to look at their prescriptions.
11:54:43 3 He works for a group that's charged amounts unknown to him
11:54:53 4 in the Purdue bankruptcy, in addition to over 2 and a half
11:54:55 5 million that was charged in this litigation.

11:54:57 6 And he testified about red flags without reading any
11:54:59 7 of the cases on them, with no opiate experience, not reading
11:55:08 8 the defendants' policies, and that's -- this is who they
11:55:11 9 bring in to counter Carmen Catizone, who's Mr. National
11:55:16 10 Board of Pharmacy.

11:55:19 11 And not ending there, they then brought Walmart hired
11:55:22 12 a statistician, Mark Glickman. Fascinating guy. He knows
11:55:27 13 chess. He knows the Beatles. Knows magic. But he doesn't
11:55:31 14 know opioids. And I don't understand why he was brought in
11:55:39 15 here as their selection to testify.

11:55:41 16 But he's the one who put charts up where they avoided
11:55:45 17 dosage units in favor of MMEs because it makes the
11:55:49 18 defendants look better.

11:55:51 19 By the way, when they get up here and start using
11:55:53 20 charts any time they put up a chart, hold them accountable.
11:55:56 21 See if their charts say MMEs or dosage units. Hold them
11:56:01 22 accountable.

11:56:03 23 He's the one who said -- you know, they had the pie
11:56:06 24 chart with just a small sliver being Walmart, and the
11:56:13 25 implication, I fear, was that Walmart was not significant.

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11:56:16 1 And so I said to him, let's put on a pie chart, Lake and
11:56:22 2 Trumbull Counties, to the population of the United States.
11:56:25 3 And they're even smaller sliver, but you don't want to say
11:56:29 4 they're not significant.

11:56:29 5 And that's when he said, well, I don't say what's
11:56:32 6 significant and what isn't.

11:56:35 7 Then Robert Hill was called as a DEA witness, an
11:56:40 8 ex-DEA witness. He was the executive assistant to Joe Rann
11:56:46 9 [sic].

11:56:46 10 Now, when he came, we had the letter where the DEA --
11:56:51 11 or the Department of Justice said that the DEA expressly
11:56:54 12 doesn't endorse his opinions nor do they reflect the
11:56:56 13 opinions of the DEA. That's pretty strong.

11:57:03 14 But this is the fellow who said that they shouldn't be
11:57:05 15 on opioids longer than 6 months.

11:57:08 16 This is the fellow who was told by the law firm that
11:57:11 17 the DEA was contacted and would be present for his
11:57:13 18 testimony, but they weren't here. And there was never any
11:57:16 19 document that showed that they rescinded what they had
11:57:18 20 written to that law firm, that they had not granted
11:57:21 21 authorization for him to come testify.

11:57:27 22 He did still agree that *Holiday* is the law.

11:57:30 23 And then we got to the pharmacists at the end of the
11:57:35 24 trial, and CVS put their pharmacist on, Kenneth Cook. He
11:57:38 25 believes that the pharmacists he supervised in Lake County

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11:57:41 1 performed to a good level. And actually, that was kind of
11:57:44 2 when I pushed him on it even further. My initial question
11:57:47 3 to him wasn't so limited.

11:57:51 4 You'll recall the note, perhaps, that I had with him.
11:57:58 5 I said, would you agree with me that there are good
11:58:01 6 pharmacists and not so good pharmacists?

11:58:05 7 He said, I don't agree.

11:58:07 8 And that's when I showed him the memo that he had
11:58:10 9 written up about the missing drugs, the missing narcotics.
11:58:22 10 And we talked about those.

11:58:23 11 And he said, I don't know if they were stolen, I don't
11:58:25 12 know if they were just missing, I don't know if they were
11:58:28 13 misdispensed. We could never figure out what happened. The
11:58:31 14 inventory just wasn't right.

11:58:33 15 I said, well, it's kind of hard to say that those
11:58:37 16 pharmacists are doing their job right, then, don't you
11:58:40 17 think?

11:58:40 18 But then as I continued to press him, I pressed him on
11:58:43 19 the opioid epidemic, and he said he hadn't seen one. He's
11:58:45 20 heard that there may be a problem, but he said, thankfully
11:58:49 21 it hadn't affected any of his family or friends.

11:58:54 22 As I continued to ask him, he on his own, used the
11:58:59 23 term, I freaked out over the losses of the opioids in the
11:59:04 24 stores. That's a -- that's an issue.

11:59:08 25 He's also the fellow who knew about Dr. Demangone's --

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11:59:12 1 I'm trying to say his name right -- Demangone's reputation.
11:59:17 2 But knows that he, at least up to 2014 or '15, was still
11:59:21 3 filling his prescriptions.

11:59:23 4 Now, maybe what he wants us to understand is that once
11:59:26 5 he learned about his reputation, he quit filling them. I
11:59:30 6 don't know. But the stores sure didn't.

11:59:33 7 We did insert in here the deposition of
11:59:37 8 Demetra Ashley, DEA head of diversion control in Chicago.
11:59:39 9 She took Joe Rann's place. She said that pharmacies are
11:59:44 10 required to provide effective controls and policies against
11:59:48 11 diversion. That's the law.

11:59:49 12 She said that the DEA advised pharmacies, but the way
11:59:52 13 they do it is by posting their case decisions, so you could
11:59:57 14 read by *Holiday*, you could read about *Medicine Shoppe*, you
12:00:01 15 could read about *East Main*, because it's there.

12:00:04 16 She also said pharmacies are the last line of defense
12:00:07 17 and that this epidemic has been raging since -- or occurring
12:00:11 18 since the early 2000s.

12:00:14 19 We had two last pharmacists. Walmart called
12:00:18 20 Lori Militello to the stand. Now, she's the one who, when I
12:00:24 21 challenged her on all the different patients that she's seen
12:00:27 22 and got her to admit, she doesn't know all of those
12:00:29 23 patients. She can't do it all by just knowing who walks in
12:00:32 24 the door. She wasn't even aware of how many trinity
12:00:35 25 prescriptions she had filled.

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12:00:36 1 And she testified that she talked to other pharmacists
12:00:38 2 to get information, but when I probed her with it with her
12:00:42 3 deposition, what she had said under oath a few months ago,
12:00:44 4 she admitted that she basically only spoke with other
12:00:46 5 pharmacists about transfers of prescriptions.

12:00:53 6 And she also, bless her heart, wasn't aware of the
12:00:56 7 opioid problem, prescription problem, until the last several
12:00:59 8 years, even though she is been practicing pharmacy for a
12:01:04 9 long, long time.

12:01:04 10 She didn't know about Walmart's multiple year delay in
12:01:07 11 providing OARRS to its pharmacists.

12:01:09 12 She was unable to satisfactorily address how she was
12:01:15 13 dispensing trinity cocktails to a hormone doctor patient,
12:01:21 14 patient of a hormone doctor. Now, yeah, his doctor title
12:01:24 15 also says rehab, so maybe that was it. She didn't have it.

12:01:30 16 We did get Deborah Mack played. She's the Walmart
12:01:38 17 senior director of compliance practices. And she's the one
12:01:40 18 who testified by a deposition, then, that blanket refusals
12:01:44 19 to fill policies were based on limited undocumented
12:01:47 20 conversations with a handful of Boards of Pharmacies, but
12:01:47 21 not Ohio's.

12:01:48 22 And the judge has a special instruction in there, that
12:01:51 23 you're not to assume the truth of those matters as to what
12:01:54 24 those policies may or may not have been in those states, but
12:01:58 25 you can assume that that might have been information that

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12:02:00 1 went towards the formulation of a policy by Walmart.

12:02:05 2 But she clearly had no testimony about Ohio, even
12:02:10 3 within that framework.

12:02:11 4 And then our last witness of the trial was Walgreens'
12:02:15 5 local pharmacist, Amy Stossel. And she recognized that
12:02:19 6 Walgreens was seen as a funnel, or at least I quizzed her on
12:02:23 7 it, a funnel for Dr. Demangone. But she was very
12:02:27 8 comfortable with her dispensing of Dr. Demangone.

12:02:31 9 She was the one who said red flags aren't always red
12:02:37 10 flags.

12:02:37 11 She was the one who said -- admitted that she had
12:02:41 12 filled questionable prescriptions. She was the one who
12:02:46 13 talked about that one fellow whose fentanyl patch came off,
12:02:49 14 who was one of the ones that Carmen Catizone pointed out was
12:02:53 15 just inundated with opiates.

12:02:57 16 And she said, well, you know, he came in hurting.

12:03:00 17 And I asked her, can you distinguish pain from
12:03:02 18 withdrawal symptoms?

12:03:03 19 She said, well, no.

12:03:05 20 She's worked for Walgreens for years and was unaware
12:03:08 21 of their DEA settlements? Walgreens can settle with the
12:03:14 22 DEA, settlements that require them to do -- or settlements
12:03:18 23 that prompt them to put in new policies that require them to
12:03:21 24 train, that require them to have these policies in place,
12:03:24 25 and she doesn't even know about it?

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12:03:31 1 And she claims to have known about red flags since the
12:03:34 2 mid 1990s.

12:03:35 3 Okay. So that was it.

12:03:38 4 Oh, by the way, I would be remiss if I didn't tell you
12:03:42 5 she has also removed information from the notes fields, and
12:03:45 6 she's the one who didn't know how to fill out a Target Drug
12:03:48 7 Good Faith Dispensing -- that's the wrong initials -- should
12:03:51 8 be Target Drug Good Faith Dispensing checklist. And did
12:03:56 9 admit that anybody filling a trinity is not doing it by
12:03:59 10 accident because you can see it. You can see it in the
12:04:01 11 OARRS.

12:04:03 12 As for her documentation problems, she thought
12:04:05 13 imperative was a suggestion.

12:04:07 14 So with that, let's spend a little bit of time before
12:04:10 15 lunch looking at the instructions that the judge has for
12:04:14 16 you. And in that regard, I want to not only put the
12:04:16 17 instructions down, but I want to talk to you about some of
12:04:19 18 the language and look at a couple of pieces of evidence that
12:04:22 19 may seem particularly relevant.

12:04:23 20 So the judge's instructions, he's already read them to
12:04:26 21 you, but you've got a copy. There are a couple of things I
12:04:28 22 want to make sure that you're attentive to as you go back
12:04:33 23 there, recognizing that y'all are going to dialogue and get
12:04:42 24 debate, who remembers what, how, where, when, why, and
12:04:44 25 how -- what it should mean. And so y'all go back there, but

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12:04:47 1 as you do, one of the first instructions that you'll see is
12:04:50 2 on Page 4 is this preponderance of the evidence, burden of
12:04:52 3 proof.

12:04:55 4 And this is the one that says I've got the obligation
12:04:57 5 to show something's more likely true than not. Just that
12:05:00 6 greater weight. Doesn't require proof to an absolute
12:05:06 7 certainly. It doesn't require even proof beyond reasonable
12:05:09 8 doubt. You can have a reasonable doubt.

12:05:11 9 And so I want you to go back there recognizing this,
12:05:15 10 not because I don't think we've proven this sufficiently. I
12:05:22 11 think we've proven this to great conviction. And I hope you
12:05:25 12 do too. But there's a chance someone back in the room with
12:05:28 13 you may not see it the way you do, and so you're going to
12:05:31 14 need to be in a position to say, time out now. This is
12:05:34 15 what's more likely than not. That's the question. That's
12:05:40 16 the burden. And so I wanted to underscore that with you.

12:05:43 17 I also wanted to underscore with you a couple of other
12:05:46 18 things. On Page 9 you're asked about the credibility of
12:05:50 19 witnesses.

12:05:54 20 I tried really hard to put on really strong witnesses
12:05:57 21 for you. You know, these aren't my employees, though,
12:06:05 22 certainly some of them we reimbursed them for their time,
12:06:10 23 and I don't mean to detract from that at all. And,
12:06:12 24 obviously, I think these companied need to put their
12:06:14 25 employees on the stand. They've got it -- you've got to

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1 hear from them. But you do recognize that they are
2 employees, and this is a major case, and their bosses are
3 paying attention, you would hope.

4 So all of that is stuff you take into account, but it
5 specifically becomes important on expert testimony. And
6 this is on Page 11 of the judge's instructions. That you
7 don't have to accept the opinions of an expert. If you
8 decide that the opinion is not based on sufficient education
9 and experience, you can disregard the opinion entirely.

10 Now, I hope you recall, I tried really hard with these
11 experts to give you their CVs, their resumes. And
12 they're -- they're voluminous. You know, Anna Lembke's
13 resume goes on for pages and pages and pages with all that
14 she's done. Not just Anna Lembke. Even Carmen Catizone
15 goes on for pages and pages and pages of all that he's done.

16 If you look at these witnesses, you look at Dr. Keyes,
17 the woman who wrote the book, and it just goes on for pages
18 and pages and pages. These are people who --
19 Caleb Alexander, the Johns Hopkins guy, I mean, it's -- we
20 brought you some of the best in the world in these subjects.
21 And if you compare them to people like Dr. Wailes
22 (indicating), whose CV bleeds over just barely -- actually,
23 it goes all the way to the end of the third page.

24 Now, this is the CV that is claiming board
25 certification with an entity that no longer exists, that

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12:08:05 1 lists -- you know, it just -- there's a difference. And
12:08:12 2 it's not just him. There are others.

12:08:15 3 You know, this is -- this is -- even William Choi,
12:08:18 4 look at what you had for him. You know, look, not just even
12:08:24 5 the ones with the bigger resumes, like Murphy, look for
12:08:29 6 their work that had anything to do with this subject matter,
12:08:31 7 and it's, like, missing. So that's what you've got on
12:08:34 8 expert opinion testimony.

12:08:36 9 In addition to that, there are a few other
12:08:38 10 instructions I want to draw your attention to.

12:08:40 11 Thank you.

12:08:40 12 One is corporate defendants on Page 16.

12:08:44 13 The conduct of an officer or employee acting within
12:08:48 14 the scope of his or her employment should be treated as the
12:08:52 15 conduct of the corporation.

12:08:54 16 So when we see conduct of employees, if it doesn't
12:08:59 17 measure up, if it's not adequate, that is imputed to the
12:09:03 18 organization for which they work. And that's something you
12:09:07 19 should be taking into account.

12:09:09 20 Now, as we get to the actual law itself, it starts on
12:09:14 21 Page 17, where the judge talks about public nuisance law,
12:09:20 22 and in his introductory comments there are a couple of
12:09:23 23 things I'd like to draw your attention to.

12:09:24 24 First of all, he talks about how a public nuisance
12:09:28 25 includes an unreasonable interference with public health or

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12:09:32 1 public safety.

12:09:34 2 I can't think that anybody's going to dispute whether
12:09:37 3 or not there's a public nuisance in these counties. There
12:09:42 4 clearly has been. The evidence isn't, oh, more likely than
12:09:47 5 not, it's overwhelming. Whether Pharmacist Cook has seen it
12:09:51 6 or not, it's overwhelming.

12:09:55 7 So, then, I've got to show, in accordance with this,
12:09:59 8 two things. I've got to show either one of two things.
12:10:03 9 I've got to show either one or two. I have got to show that
12:10:07 10 either the defendant engaged in intentional conduct that
12:10:11 11 caused a significant and ongoing interference with this
12:10:17 12 public right, or that they engaged in unlawful conduct with
12:10:23 13 the same result.

12:10:25 14 I think we've done both. The intentional element is
12:10:28 15 certainly met. They weren't accidentally dispensing opiates.
12:10:32 16 They knew what they were doing. The pharmacists claimed to
12:10:35 17 have been trained. The companies claimed to be supplying
12:10:39 18 adequate policies and procedures. There was clearly
12:10:43 19 knowledge of what was going on in place.

12:10:46 20 The conduct, poor, inadequate, or superb, was
12:10:55 21 intentional conduct each step along the way. Nobody was
12:10:58 22 ever accidentally doing anything at all here. This isn't
12:11:01 23 where someone accidentally dumped a bunch of lead into the
12:11:04 24 water supply without realizing that the lead in the paint
12:11:08 25 that they dumped in or something like that. This was

Closing Argument - Lanier

12:11:10 1 conduct that was understood and known from the beginning.
12:11:15 2 But it's also unlawful conduct. And it only has to be one
12:11:18 3 or the other.

12:11:19 4 So if you're back there and you're saying, you know, I
12:11:21 5 think it was intentional because of this, that, and the
12:11:23 6 other, and someone says, no, I don't really see that,
12:11:27 7 remember, it can be unlawful instead.

12:11:29 8 The law -- now, does the law say you must document?
12:11:34 9 Well, no, and yes. The law says you've got to follow
12:11:38 10 standard of care. The law says you've got to do what is
12:11:43 11 reasonably to be done to prevent diversion. And the
12:11:47 12 testimony after testimony after testimony, including the
12:11:50 13 defendants' policies at each of the three defendants says,
12:11:52 14 you must document. It's imperative. It must be done. As
12:12:01 15 one of the witnesses said --

12:12:03 16 Who was our enforcement guy who said if it's not
12:12:06 17 documented, it's not done?

12:12:08 18 MR. WEINBERGER: Edwards.

12:12:09 19 MR. LANIER: Edwards. Trey Edwards. Called
12:12:12 20 by the defendants. If it's not documented, didn't happen.
12:12:15 21 And that's just the way it is.

12:12:17 22 Now, you're not being asked to determine whether there
12:12:22 23 should be a remedy for this claim. This may be the only
12:12:27 24 civil case you ever get called on where nobody's asking you
12:12:31 25 for money. That's all in the Court's hands, what's got to

Closing Argument - Lanier

12:12:35 1 be done, what remedy there may be or may not be. That's not
12:12:40 2 your question.

12:12:42 3 And I want to be really clear when I said that this is
12:12:44 4 a case that I believe has national ramifications, that's not
12:12:47 5 your concern either. In answering the judge's questions,
12:12:52 6 your concern is these two counties and the actions of these
12:12:56 7 defendants as it has affected these two counties. What
12:13:00 8 happens after that is not your concern. All you've got to do
12:13:05 9 is focus on that. And that's what the judge is telling you
12:13:10 10 here.

12:13:11 11 Then the judge goes into great -- I don't want to
12:13:14 12 throw them at you -- on Page 19 where he talks a little bit
12:13:16 13 more about intentional conduct. And he says this is conduct
12:13:20 14 done purposefully, not accidentally.

12:13:23 15 Well, that's clearly what we've got here.

12:13:25 16 This is conduct where it says, it's not necessary for
12:13:27 17 you to find that the person intended to cause a public
12:13:30 18 nuisance.

12:13:33 19 You know, this is -- this is intent that they've got
12:13:37 20 to have intent. They can't be doing this accidentally. And
12:13:40 21 the intent has to be one that's intentional conduct, that
12:13:45 22 they acted and knew or was substantially certain that
12:13:48 23 circumstances might interfere or would interfere. It says
12:13:52 24 not might, would.

12:13:53 25 But I think all of their witnesses have said that.

Closing Argument - Lanier

1 They all know that diversion can interfere and can be a
2 problem. They all know they have corresponding
3 responsibility. They all know if they don't have the
4 policies in place, that they're not where they need to be.
5 And that's always been intentional with all of them. It's
6 never been an accident.

7 Number 20, Page 20, talks about the settlement
8 agreements.

9 You know, we were allowed to bring settlement
10 agreements, some settlement agreements to you and show them
11 to you. There were provisions that we're not allowed to
12 tell you about in those agreements. Rightfully so. Because
13 the agreements themselves are not proof that something wrong
14 was done by these defendants in these counties. But what
15 they are is notice to the defendants of what's going on in
16 their pharmacies. And it's also relevant to us to see how
17 they've affected national policy because some of the
18 settlement agreements we were allowed to show you where it
19 required some changes by these defendants on a national
20 basis. That's in a memorandum of understanding with
21 Walmart. That's the agreement that CVS had out of the
22 *Holiday* case. That's the agreement that Walgreens had.
23 Required changes.

24 Employee conversations, Number 21. This is the one I
25 talked to you about on that Boards of Pharmacy.

Closing Argument - Lanier

1 You've heard testimony from one or more of the
2 defendant employees about conversations with state boards of
3 pharmacies. This evidence was admitted for a limited
4 purpose. It's evidence of the defendants' knowledge or
5 intent, but not evidence of the official policy of any Board
6 of Pharmacy. This idea that you couldn't do a blanket
7 refusal to fill, you don't have evidence of that being the
8 official policy of any state board, period.

9 Page 22 talks about the unlawful conduct. Remember,
10 there are two different ways we can prove this: One is
11 intentional, the other is unlawful.

12 Unlawful conduct, the judge said, can occur either by
13 acting in a certain way prohibited by law, or failing to act
14 in a certain way required by law.

15 Now, the law requires them to put processes into place
16 to stop diversion. We contend that they didn't, especially
17 in a timely manner.

18 The judge said unlawful conduct occurs when a person
19 engages in a conduct prohibited by a statute, an ordinance,
20 a regulation that controls safety. And we've given you
21 those. We've given you the Controlled Substance Act and tis
22 requirements. We've given you the regulations that were
23 formulated under that, and we've given you the
24 interpretation and application of those through various
25 cases that have been unfolded over time.

Closing Argument - Lanier

12:16:49 1 The person does not need to know their conduct is
12:16:54 2 unlawful for an unlawful act to occur.

12:16:56 3 That's in layman's parlance -- I say layman's. We
12:17:00 4 learned it in law school. Ignorance is no excuse, I think
12:17:07 5 is the way we learned it. But I went to law school in
12:17:09 6 Texas, Texas Tech, in Lubbock, Texas, the Hub of the Plains.
12:17:14 7 You've probably heard of it.

12:17:14 8 The person does not need to know their conduct is
12:17:18 9 unlawful.

12:17:18 10 A law controls safety if it imposes specific legal
12:17:22 11 requirements for the protection of the health, safety, and
12:17:25 12 welfare of others.

12:17:27 13 That's what we've here. That's -- this is -- this
12:17:30 14 is -- this is exactly what we have here.

12:17:33 15 And if a person's conduct does not comply with what's
12:17:36 16 authorized by law, that conduct may be unlawful conduct.

12:17:42 17 The judge adds this: The Federal and Ohio Controlled
12:17:46 18 Substances Act and their accompanying regulations do not
12:17:48 19 require strict or perfect compliance. This is what I was
12:17:52 20 saying to you earlier. Pharmacists aren't going to call it
12:17:55 21 right every time. And I'm not here nitpicking on one or
12:17:59 22 another. But substantial requirement -- compliance is
12:18:06 23 required.

12:18:07 24 Only unlawful conduct that causes a significant
12:18:09 25 interference with a public right to health or safety can be

Closing Argument - Lanier

a public nuisance.

So we've got to ask what is significant. All right? I mean, I think if one life is lost, it's significant. I think if one family's destroyed, it's significant. But we're not dealing with one family. We're not dealing with one life. We're dealing with over 10 million pills. We're dealing with something much beyond that, and the significance I don't think should be an issue.

Unlawful -- this conduct is further given by the judge on Page 23 where he talks about entities that are authorized to dispense controlled substances are required to provide effective controls and procedures to guard against theft and diversion. That's the law. And the judge explains it.

And he also adds that the pharmacists who fills prescriptions has that corresponding responsibility to make sure it's a legitimate medical purpose, and that that proper dispensing extends to the pharmacy itself. It's not simply the pharmacist. It extends to the pharmacy.

So, final point here, it's got to be knowingly, but knowingly includes when a person acts with deliberate ignorance or willful blindness to information in their possession. And they were certainly aware that these drugs were highly addictive. That's what it means to be a Schedule II drug. They certainly were aware of the dangers. They certainly were aware of the potential problems, and

Closing Argument - Lanier

12:19:49 1 they were aware of the risk of diversion. So they can't be
12:19:54 2 willfully blind to any of that.

12:19:55 3 Now, the last couple of instruction pages that I want
12:19:57 4 to talk to you about --

12:19:58 5 And there are just a couple more, and then I'll sit
12:20:00 6 down, Your Honor.

12:20:01 7 -- is Page 24, causation. Because the defendant's
12:20:06 8 conduct must have caused this interference, and the judge
12:20:09 9 says, let me explain something about causation. There's
12:20:11 10 this legal word, proximate cause of a public nuisance.

12:20:15 11 Our youngest daughter, Sara, is in her first year of
12:20:18 12 law school right now. She's taking torts, and one of the
12:20:21 13 things you learn in torts, you spend weeks on proximate
12:20:24 14 cause. Y'all are getting it here and you didn't have to pay
12:20:28 15 tuition. The judge has just given you a classic education
12:20:33 16 in proximate cause.

12:20:35 17 Here it is: A defendant's conduct proximately caused
12:20:38 18 a public nuisance if the circumstances that constitute the
12:20:41 19 nuisance are the natural and foreseeable result of the
12:20:45 20 conduct.

12:20:46 21 In other words, it is natural and foreseeable if
12:20:50 22 there's going to be diversion that it's going to lead to
12:20:56 23 addiction and problems. If there's going to be an
12:20:59 24 oversupply that can lead to diversion. There's not anybody
12:21:04 25 who really challenged that. Everybody -- witnesses for all

Closing Argument - Lanier

1 three defendants have admitted that they know that diversion
2 can lead to these problems, and that they are supposed to
3 safeguard against diversion. Heavens, that's why we have
4 the Controlled Substances Act in the first place is because
5 this is foreseeable.

6 Now, here's the important. There may be more than one
7 proximate cause of a public nuisance. This goes back to,
8 you know, you flood the county with drugs or you flood your
9 house with water. You can't say which bucket of water it
10 was that did the damage. It's a bunch of them. You know,
11 this was my analogy. You've seen the same suit on me for
12 the last three weeks because I outgrew the other one that I
13 had to wear. But it wasn't one cookie that did it. I think
14 it was the lasagna. I think it was the bread. I think it
15 was the stack of cookies. There is a place here that makes
16 a chocolate chip cookie that is to die for, or to diet for,
17 as the case may be.

18 To be a proximate cause, the acts or omissions -- and
19 the reason I say that is, look, I don't mind -- I blame the
20 doctors, I blame drug cartels, I blame the DEA, I blame the
21 FDA, I blame the Ohio Board of Pharmacy. I blame a lot of
22 different people. I certainly blame the manufacturers. I
23 have no trouble and my witnesses have no trouble saying
24 there's a host of people to blame. The question is, does it
25 include these chain pharmacies that you have in the

Closing Argument - Lanier

12:22:35 1 courtroom? And that's what you're being asked here.

12:22:38 2 Are they a part of the cause?

12:22:43 3 An individual defendant's conduct doesn't have to be
12:22:46 4 independently capable, all by itself, of causing the public
12:22:50 5 nuisance. There may be multiple causes of a public
12:22:55 6 nuisance. It just needs to be a substantial factor, and
12:22:59 7 it's substantial if a reasonable person would regard it as
12:23:02 8 the cause or one of the material, meaningful, or
12:23:05 9 considerable causes, which I think certainly is the case
12:23:09 10 here.

12:23:09 11 And so as you get back there, if anybody fusses over
12:23:13 12 some of this with you as you look at the issues, just go
12:23:17 13 back to the language of the judge's charge. This is -- this
12:23:22 14 is -- this is it. This is your touchstone. This is it.

12:23:28 15 A defendant doesn't have to foresee their conduct
12:23:31 16 would lead to the specific nuisance that occurred, it just
12:23:34 17 needs to be foreseeable.

12:23:35 18 And so within the framework of that, last two pages.
12:23:40 19 26. Public nuisance.

12:23:42 20 Is an interference with a public right. It's not --
12:23:47 21 oh, this is, when it's significant.

12:23:50 22 An interference with a public right may range from a
12:23:52 23 petty annoyance to a serious harm.

12:24:00 24 You got your neighbor who is not mowing his or her
12:24:04 25 grass, and it's growing up kind of tall, and it's messing up

Closing Argument - Lanier

12:24:08 1 your hayfever. The odds are you're not going to do that well
12:24:13 2 on a public nuisance case. Okay? This is not that kind of
12:24:18 3 a petty situation. This is one where lives are changed,
12:24:22 4 families are altered, communities are devastated. This is
12:24:26 5 serious.

12:24:26 6 An interference with a public right is not significant
12:24:29 7 or unreasonable if it causes only a relatively slight amount
12:24:32 8 of inconvenience.

12:24:34 9 An interference with a public right is significant or
12:24:38 10 unreasonable if it causes greater harm than the public
12:24:40 11 should be required to bear, considering all the
12:24:43 12 circumstances.

12:24:45 13 And that we have here.

12:24:46 14 So then the judge gives you your conclusion and tells
12:24:51 15 you what you will assign and what you will find, and I think
12:24:56 16 at some point at the end of the day he will give you the
12:24:58 17 questions that you will answer, and if need be, we'll talk
12:25:01 18 about those in my rebuttal. But for now you have done the
12:25:06 19 road map, and we've done two of the stops. We've done the
12:25:09 20 recap, we've done the judge's instructions. My road map
12:25:12 21 detours from my closing for you to hear from CVS, Walmart,
12:25:15 22 and Walgreens after lunch, and then I'll give the finale at
12:25:19 23 the end of the day and y'all get the case.

12:25:21 24 So thank you, Your Honor, for letting me go this long.

12:25:24 25 Thank y'all for being so patient.

12:25:26 1 THE COURT: All right. Thank you, Mr. Lanier.

12:25:29 2 And thanks, ladies and gentlemen, for extending
12:25:32 3 things, but I didn't want to break up the balance of the
12:25:37 4 closing.

12:25:38 5 So we will recess till 1:30.

12:25:40 6 Usual admonitions apply. Do not discuss this case.
12:25:44 7 Do not encounter anything in the media. And we will have
12:25:48 8 the closing arguments of Walgreens, Walmart, and CVS this
12:25:53 9 afternoon in whatever order they prefer, and then the last
12:25:57 10 few minutes of Mr. Lanier's closing.

12:25:59 11 So have a good lunch, and see you at 1:30.

12:26:03 12 (Jury excused from courtroom.)

12:26:03 13 (Recess was taken from 12:26 p.m. till 1:29 p.m.)

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12:26:03 1

AFTERNOON SESSION

01:29:36 2

(In open court at 1:29 p.m.)

01:29:36 3

COURTROOM DEPUTY: All rise.

01:29:45 4

MR. MAJORAS: Your Honor, before we begin, I

01:29:46 5

have one issue. John Majoras.

01:29:48 6

THE COURT: Okay.

01:29:48 7

MR. MAJORAS: We had talked about a potential

01:29:50 8

curative instruction related to the bolstering of expert

01:29:53 9

witnesses. You had not given that. I don't know whether

01:29:55 10

you ruled against that. If not, I do have a proposal that I

01:29:59 11

can hand up.

01:29:59 12

THE COURT: All right. What are you

01:30:01 13

suggesting?

01:30:05 14

MR. MAJORAS: I will hand this to you at the

01:30:06 15

other side. Ms. Fumerton will do it.

01:30:14 16

And I'll read it into the record. "It is up to you,

01:30:16 17

the jury, to decide the credibility of the witnesses you

01:30:20 18

have observed at trial. Counsel views of their own

01:30:23 19

witnesses, paid or unpaid, or of the other side's witnesses

01:30:26 20

are not evidence and are irrelevant. You should not

01:30:28 21

consider them in any way when rendering your verdict or

01:30:31 22

making your own determination regarding a witness'

01:30:34 23

credibility."

01:30:52 24

THE COURT: Well. . .

01:30:53 25

Well, this is what I'm going to say. I'm going to

01:31:04 1 just say, "It is up to you, the jury, to decide the
01:31:07 2 credibility of the witnesses you have observed at trial.
01:31:10 3 Counsel's views of their own witnesses, paid or unpaid, or
01:31:15 4 of the other side's witnesses, are not evidence."

01:31:18 5 And I'll end it at that.

01:31:25 6 MR. MAJORAS: Thank you, Your Honor.

01:31:25 7 THE COURT: Because, you know, the rest is --
01:31:30 8 I think is surplusage. I think we already -- I already have
01:31:34 9 a general instruction that counsel's questions and comments
01:31:37 10 aren't evidence, but I think in light of what was said, I
01:31:40 11 will -- I'll just read the first part.

01:31:42 12 Okay. We can bring in the jury, please.

01:32:22 13 And the reason is the jury may consider what
01:32:25 14 counsel say. They're free to consider it. They're free to
01:32:29 15 reject. So my point is that their views are not evidence.
01:32:32 16 Counsel's views are not evidence.

01:32:38 17 (Brief pause in proceedings.)

01:33:06 18 (Jury returned to courtroom at 1:33 p.m.)

01:33:06 19 THE COURT: Please be seated.

01:33:10 20 All right. Ladies and gentlemen, before we have the
01:33:14 21 final arguments of each of the defendants, I want to remind
01:33:19 22 you that it is up to you, the jury, to decide the
01:33:22 23 credibility of the witnesses you've observed at trial.
01:33:26 24 Counsel's views of their own witnesses, paid or unpaid, or
01:33:30 25 of the other side's witnesses, are not evidence.

Closing Argument - Swanson

01:33:34 1 Okay. Who would begin?

01:33:37 2 Okay. Mr. Swanson, for Walgreens.

01:33:48 3 CLOSING ARGUMENT BY DEFENDANT WALGREENS

01:33:48 4 MR. SWANSON: Thank you, Your Honor.

01:33:49 5 May it please the Court.

01:33:52 6 Good afternoon, ladies and gentlemen of the jury.

01:33:57 7 I haven't been before you for a bit. Again, my name's
01:34:01 8 Brian Swanson, and I want to begin by letting you know that
01:34:05 9 it's been a real privilege, along with my partners, Kate and
01:34:12 10 Kaspar, to present our case to you on behalf of Walgreens
01:34:16 11 and its pharmacists.

01:34:18 12 Seems like a long time ago that Kaspar stood up and
01:34:23 13 told you in opening statements what we thought the evidence
01:34:25 14 was going to show in this trial. But since that day, your
01:34:29 15 attention to this case, your patience, your curiosity, your
01:34:36 16 engagement has really been remarkable. And our system of
01:34:39 17 justice doesn't work without folks like you who are willing
01:34:44 18 to step away from your daily lives and your jobs and your
01:34:49 19 activities and commit yourselves to resolving disputes,
01:34:54 20 really serious disputes like the one we have here.

01:34:58 21 So I want to begin on behalf of myself, my team, and
01:35:06 22 all of Walgreens by thanking you for your dedication to this
01:35:11 23 case.

01:35:11 24 Now, we've been here for a bit more than 6 weeks, and
01:35:15 25 I have about an hour in summation so I'm going to try to be

Closing Argument - Swanson

01:35:18 1 as efficient as I can be and cover three main areas.

01:35:23 2 First thing I want to talk about is the issues that
01:35:26 3 you will decide in this case. Then I want to talk a bit
01:35:30 4 about Walgreens, its conduct and some of the allegations
01:35:32 5 that have been made against us, and then finally, I want to
01:35:35 6 talk about plaintiffs' failure to prove.

01:35:46 7 So, for the first time this morning, with the Court's
01:35:49 8 instructions, you learned very specifically what issues
01:35:52 9 you're being asked to decide and what law will guide you in
01:35:55 10 making those decisions. And you may have been surprised,
01:36:00 11 given the presentation that you've heard over the past
01:36:02 12 several weeks, that you're not going to be asked to decide
01:36:04 13 whether Walgreens' pharmacists always complied 100 percent
01:36:10 14 with our policies. And you're not going to be asked to
01:36:13 15 decide whether Walgreens' pharmacists always followed best
01:36:18 16 practices, or whether any Walgreens' pharmacists ever acted
01:36:27 17 negligently in filling prescriptions. You're not going to
01:36:30 18 be asked to decide whether chain pharmacies are part of the
01:36:32 19 problem, as Mr. Lanier stated in his closing arguments.

01:36:37 20 In deliberations you're going to be asked to decide
01:36:39 21 two very specific questions, and I want to talk to you about
01:36:42 22 those now.

01:36:44 23 This is the verdict form that you'll be given when you
01:36:48 24 go back to begin your deliberations. And you'll be given
01:36:51 25 one for Lake County and one for Trumbull County, but they're

Closing Argument - Swanson

01:36:54 1 going to have the same questions that you're going to be
01:36:56 2 asked to decide.

01:36:57 3 The first one is did Lake County or Trumbull County
01:37:01 4 prove, by the greater weight of the evidence, that
01:37:05 5 oversupply of legal prescription opioids and diversion of
01:37:08 6 those opioids into the illicit market outside of appropriate
01:37:13 7 medical channels is a public nuisance in Lake County?

01:37:18 8 You will be asked the same question for Trumbull
01:37:21 9 County.

01:37:21 10 So, in other words, the first question is whether
01:37:23 11 plaintiffs have proven that, one, there's an oversupply of
01:37:27 12 prescription opioids, that there's diversion of those same
01:37:32 13 opioids, and that -- and that that diversion constitutes a
01:37:37 14 public nuisance in the county today.

01:37:39 15 Now, only if you answer that question yes will you be
01:37:44 16 asked to answer the second question, did Lake County prove
01:37:47 17 by the greater weight of the evidence that any of the
01:37:50 18 following defendants -- so, Walgreens, Walmart, CVS --
01:37:53 19 engaged in intentional and/or illegal conduct which was a
01:37:58 20 substantial factor in producing the public nuisance that you
01:38:02 21 found exists in Question 1?

01:38:07 22 Now, you heard the jury instructions this morning, and
01:38:10 23 I want to focus on a couple that we believe are important
01:38:12 24 for you in evaluating these two questions.

01:38:19 25 The first you can see, you're going to be asked

Closing Argument - Swanson

whether there was intentional conduct, and the Court has defined intentional conduct for you, and Mr. Lanier mentioned this in his closing as well.

Intentional conduct occurs when a person acts with the purpose to produce a specific result. And Mr. Lanier said, well, that's easy, because clearly we intended to dispense opioid medicines. But that's not the question. The question is whether we intended to produce a specific result. The specific result is what they've alleged here, the diversion of opioids, overdoses, deaths, abuse. They have to establish that we intended to produce those specific results.

He talked about illegal or unlawful conduct, and we also have the instruction on that.

A violation of the corresponding responsibility occurs when a person knowingly fills or allows to be filled an illegitimate prescription. They have to show that we knowingly dispensed opioids based on prescriptions that didn't have a legitimate medical purpose. Not simply that a pharmacist dispensed a prescription that was not legitimate. Okay? They have to establish that we did that knowingly.

And, finally, even if you were to conclude that there was a pharmacist who had knowingly dispensed an illegitimate prescription, they'd have to prove -- we're not required to perfect compliance, only substantial compliance is required.

Closing Argument - Swanson

01:40:06 1 So even if you were to conclude that somebody had done
01:40:08 2 something wrong, we're not required to be perfect.

01:40:13 3 Now, I'm going to talk a lot more about these issues
01:40:16 4 and this law as we proceed down the road, but to start off,
01:40:19 5 I want to take a step back and look at the big picture in
01:40:25 6 the context of those questions that you have to answer and
01:40:28 7 the instructions that will guide you.

01:40:31 8 So here's what the undisputed evidence showed at
01:40:34 9 trial:

01:40:35 10 First of all, as pharmacies, we dispense medicines,
01:40:39 11 including opioid medicines. We all knew that. Those
01:40:43 12 medicines are approved for use by the FDA. Every different
01:40:46 13 medication that we dispensed, Vicodin, fentanyl patches,
01:40:50 14 OxyContin, okay, the FDA has concluded that they have a
01:40:54 15 legitimate medical use. And every expert witness who came
01:40:58 16 in for both sides acknowledged that these drugs are vitally
01:41:07 17 important for patients who need them.

01:41:09 18 These opioids medications, obviously, they are
01:41:12 19 regulated by the DEA. You heard this morning and you heard
01:41:15 20 during trial the DEA sets the annual production quota for
01:41:18 21 opioid medicines every year. They control the volume.

01:41:21 22 But the DEA also regulates pharmacies, like the chain
01:41:24 23 pharmacies. All right? If we want to dispense Class II
01:41:29 24 medications, we have to be registered with the DEA. And you
01:41:32 25 heard from Mr. Rannazzisi and Ms. Ashley and others on that.

Closing Argument - Swanson

01:41:36 1 The Board of Pharmacy in Ohio, they separately
01:41:38 2 regulate the pharmacies here. Right? They license us.
01:41:42 3 They inspect us. They work with us on investigations.

01:41:46 4 The opioid medicines that we dispense, they're all
01:41:51 5 prescribed by doctors who themselves are registered with the
01:41:54 6 DEA and licensed by the state board of medicine. And you
01:41:58 7 heard throughout trial, again, Mr. Lanier mentioned this
01:42:01 8 morning, the vast, vast majority of those doctors are good
01:42:08 9 doctors. They are trying to do right by their patients.

01:42:10 10 We also know -- we also know that Walgreens, Walmart,
01:42:13 11 and CVS pharmacies in Lake County and in Trumbull County
01:42:18 12 have not faced any enforcement actions from the FDA. All
01:42:23 13 right? Not once has the DEA suspended or revoked the
01:42:29 14 registration for any of our pharmacies in Lake County or
01:42:32 15 Trumbull County. Not once.

01:42:35 16 Neither has state Board of Pharmacy. Right? They
01:42:38 17 license us. Not once have any of our pharmacies in
01:42:43 18 Lake County or Trumbull County had our license suspended or
01:42:48 19 revoked by the state.

01:42:51 20 And it's not like our pharmacies fly under the radar
01:42:54 21 here. Right? We're the big chain pharmacies. We interact
01:42:57 22 constantly with the Board of Pharmacy and with the DEA.
01:43:04 23 Now, nothing new here. You've heard all of this. None of
01:43:08 24 it's disputed. Why does it matter?

01:43:10 25 It matters because as you now know from the

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01:43:15 1 instructions that are going to govern your deliberations, in
01:43:17 2 order to prevail, the plaintiffs have to prove that our
01:43:21 3 dispensing conduct was so egregious that we intentionally
01:43:26 4 were illegally oversupplied enough opioid pills to harm
01:43:30 5 entire communities to cause a public nuisance, an opioid
01:43:39 6 epidemic, in Lake and Trumbull County. That's what they
01:43:41 7 have to prove.

01:43:42 8 But if they were right, that chain pharmacies were
01:43:45 9 intentionally or illegally flooding these communities with
01:43:49 10 opioids that were being diverted, surely the DEA or the
01:43:55 11 Board of Pharmacy or local law enforcement would have
01:43:57 12 noticed. They would have done something. The DEA knows how
01:44:02 13 to act.

01:44:04 14 Mr. Lanier, this morning, said that their budget was
01:44:07 15 strained and they didn't have the resources to keep up with
01:44:10 16 what was going on in pharmacies. Well, that's just not
01:44:12 17 right.

01:44:14 18 Mr. Rannazzisi, from the DEA, came in and testified.
01:44:18 19 He said the DEA had a budget of \$400 million annually. He
01:44:24 20 oversaw, personally, more than 300 people, and the DEA had
01:44:27 21 1,200 field personnel across the country who could inspect
01:44:32 22 pharmacies and who could -- who would know what was going
01:44:35 23 on.

01:44:36 24 We saw that the Board of Pharmacy and law enforcement,
01:44:39 25 we know what they do when they see suspicious activity

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1 coming out of a pharmacy, they shut them down, like they did
2 with Overholt's. Nothing like that happened with any of our
3 pharmacies in Lake County or Trumbull County.

4 And here's the thing, the plaintiffs could have
5 brought in any law enforcement officer or any Board of
6 Pharmacy agent, any member of the sheriff's department, any
7 local DEA officer, any narcotics agent to come in and talk
8 about the conduct of our pharmacists and our pharmacies, if
9 it were true, that we were intentionally or illegally
10 oversupplying these markets, or could have had someone talk
11 about our conduct today or 5 years ago or 10 years ago.

12 If such a person existed, plaintiffs could have
13 brought someone in from the counties to testify under oath
14 that our pharmacies were even a small fraction of the
15 problem in either county. They brought in one law
16 enforcement officer. You recall, he came up this morning,
17 Captain Tony Villaneuva. By all accounts, he's a terrific
18 officer. Right? And I was reminded he was also on opioid
19 task force. He does great things for his community in
20 Trumbull County trying to fight drug abuse.
21 Captain Villanueva didn't have a thing to say, not a thing
22 to say about any wrongful conduct of our pharmacies. But we
23 saw in his communications with one of his deputies what he
24 felt about the problem in his county.

25 You recall seeing this, the e-mail from

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01:46:18 1 Joseph Dragovich to Mr. Villanueva, Captain Villanueva back
01:46:22 2 in 2019. He said, it looks like we're in trouble with the
01:46:25 3 big three, cocaine, heroin, and fentanyl. We need to take
01:46:30 4 down a few big dealers.

01:46:33 5 Talking about in 2019 the problem they were seeing in
01:46:37 6 Trumbull County, opioids, was heroin and was fentanyl.

01:46:42 7 Now, it's kind of ironic that it's the pharmacies who
01:46:47 8 called in more law enforcement officers to testify than the
01:46:50 9 plaintiffs did, but we did. We brought in the two agents
01:46:54 10 from the Board of Pharmacy, Agent Pavlich and Agent Edwards.

01:47:01 11 Now, Mr. Lanier tried in closing to sort of downplay
01:47:08 12 the Board of Pharmacy, at least through their interactions
01:47:11 13 that they might have with us. He said, well they only
01:47:14 14 inspect them once a year, and that's not enough to sort of
01:47:17 15 detect what's going on. But you heard from them. That's
01:47:19 16 not all that the Board of Pharmacy does. They also conduct
01:47:23 17 investigations. They conduct investigations of suspected,
01:47:28 18 excuse me, doctor shoppers. Right? The criminals who try
01:47:32 19 to go out and get prescriptions from different doctors and
01:47:34 20 get them filled.

01:47:35 21 And during those investigations they're going through
01:47:37 22 the PDMP data, they're going through OARRS. They're trying
01:47:42 23 to figure out where these folks are filling their pills.
01:47:45 24 Right? They know what pharmacies are doing. It's not
01:47:48 25 invisible to the BOP what Walgreens, Walmart, and CVS are

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01:47:51 1 doing and what's being filled. If they had suspicions, they
01:47:55 2 could have acted on those.

01:47:57 3 But neither of those individuals suggested that we had
01:48:00 4 any role in contributing to the crisis today. Just the
01:48:04 5 opposite. They both testified that the chain pharmacies
01:48:07 6 were their allies in fighting diversion, that when we saw
01:48:13 7 suspicious activity, we'd call them up so they could begin
01:48:17 8 investigations. They both testified that our pharmacies
01:48:20 9 complied with the law, not violated it.

01:48:24 10 As you saw in the instructions, as jurors, you bring
01:48:27 11 your common sense to bear on the questions that you need
01:48:30 12 to -- that you're being asked to resolve, and when you
01:48:32 13 compare these facts on the ground in time versus the
01:48:36 14 allegations and the arguments that get presented to you at
01:48:38 15 trial by lawyers and experts, I think it shows that
01:48:42 16 plaintiffs' theory of liability doesn't hold together when
01:48:44 17 you consider what it is that plaintiffs actually have to
01:48:47 18 prove.

01:48:48 19 If we were acting with the intent to cause an opioid
01:48:54 20 epidemic in Lake County or Trumbull County, if we were
01:48:57 21 violating the law, you would have seen evidence of that from
01:49:01 22 law enforcement, or from the state regulators, or the
01:49:04 23 federal regulators. But you didn't.

01:49:07 24 Okay. I want to switch topics now and talk a little
01:49:12 25 bit about Walgreens and our conduct and the allegations that

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01:49:18 1 have been made against us.

01:49:19 2 I know that you all knew Walgreens coming into this
01:49:22 3 case. I'm sure some or all of you had shopped there. You
01:49:26 4 understand that we're pharmacies. We have front store
01:49:30 5 operations, shampoo, your school supplies, but you can also
01:49:35 6 get your prescriptions filled. But I hope that through
01:49:38 7 meeting and hearing from some of our people at different
01:49:41 8 levels in the organization you have a little bit better
01:49:44 9 sense of who we are and what we do, and in particular, I
01:49:50 10 hope that through the testimony, you have a sense of how
01:49:53 11 seriously our employees take their commitments to their
01:49:57 12 community. So I want to reintroduce a few of them to you
01:50:00 13 from this morning.

01:50:01 14 The first is Amy Stossel. This is her work picture.
01:50:06 15 She pulled down the mask. You'd probably recognize her
01:50:09 16 better. She was the last witness to testify. She's a
01:50:12 17 Walgreens' pharmacist in Willoughby, Ohio. And Ms. Stossel
01:50:17 18 testified that pharmaceutical diversion is a real concern to
01:50:22 19 her. Of course it's a concern to her. As she said, she's
01:50:27 20 living and raising her teenage son and her teenage daughter
01:50:31 21 in the community.

01:50:33 22 She testified about how important it is to Walgreens'
01:50:38 23 pharmacists that they consult with their patients and really
01:50:40 24 make sure their patients understand the medicines they're
01:50:44 25 taking. And she said she always tried to take time to get

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01:50:47 1 to know her patients and ensure that they understood the
01:50:50 2 medications that they were being prescribed.

01:50:53 3 She told you about Walgreens' pharmacists in the real
01:50:56 4 life process for evaluating a prescription and the steps
01:50:59 5 that they take in filling a prescription, the different
01:51:04 6 things that she might do to resolve red flags that presented
01:51:07 7 with prescriptions that she saw. And as Mr. Lanier noted,
01:51:10 8 and she testified, red flags are something that she's been
01:51:13 9 familiar with since she was back in pharmacy school.

01:51:17 10 Now, during his closing this morning, I need to
01:51:21 11 correct something. Mr. Lanier said that Ms. Stossel
01:51:25 12 admitted that she filled questionable prescriptions. That's
01:51:30 13 what I wrote down. And that's just false. And if he had
01:51:34 14 evidence of that, he would have showed you the testimony,
01:51:36 15 but he didn't.

01:51:38 16 Ms. Stossel talked about her IntercomPlus dispensing
01:51:44 17 system and all the information that it contains to help
01:51:47 18 pharmacists exercise their corresponding responsibility.
01:51:49 19 And you might recall this slide from her testimony when she
01:51:53 20 was on the stand. So you got to see, for example, you know,
01:51:58 21 how the prescription got scanned in, and if you can put on
01:52:03 22 the little Post-it note on the prescription, and you saw
01:52:05 23 that there was a spot for patients' comments and prescriber
01:52:09 24 comments where pharmacists could put in information that
01:52:12 25 they learned from the patient or the prescriber when they

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01:52:15 1 communicated with them. And there were little yellow
01:52:21 2 notepads, so if a pharmacist was coming in, they would know
01:52:23 3 if there were existent notes that they should be looking
01:52:27 4 when they were making a decision whether or not to fill.

01:52:29 5 Ms. Stossel also talked about our drug take back
01:52:32 6 kiosks at her store and about the free disposal pouches that
01:52:38 7 Walgreens offered to its customers, the commitment to
01:52:41 8 getting unused drugs off the streets so they can't be used
01:52:44 9 for medicine cabinet diversion.

01:52:47 10 Ms. Stossel is not some rogue pharmacist who cares
01:52:51 11 more about filling scripts than she does about the community
01:52:54 12 where she's raising her kids. If the plaintiffs thought
01:52:59 13 that Walgreens hired those types of pharmacists, they would
01:53:03 14 have brought one in to testify so they can cross-examine
01:53:06 15 him. But they didn't. We heard from Ms. Stossel. And
01:53:09 16 Ms. Stossel's not unique. She's a typical Walgreens
01:53:12 17 pharmacist.

01:53:13 18 You saw this morning and heard from early in the case
01:53:19 19 Mr. Brian Joyce. He was called by plaintiffs. He was a
01:53:23 20 former district manager in Trumbull County. He's recently
01:53:30 21 retired. You'll recall he was also a licensed pharmacist
01:53:32 22 and he served on the Ohio Board of Pharmacy for a period of
01:53:35 23 time elected by Governor Strickland.

01:53:38 24 Mr. Joyce testified about the pharmacies in his
01:53:41 25 county, his interactions with law enforcement and the Board

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01:53:45 1 of Pharmacy agents when he encountered suspicious activity.
01:53:49 2 He was challenged about why he didn't put blanket refusals
01:53:53 3 on some doctors. Why didn't Walgreens put blanket refusals
01:53:58 4 on some doctors, referring specifically to Dr. Veres, I
01:54:02 5 believe.

01:54:03 6 This is what he said: He said, I don't think it's
01:54:06 7 good policy to cut any one doctor off completely because,
01:54:10 8 like I said, good doctors have a couple bad patients, bad
01:54:14 9 doctors have some good patients.

01:54:15 10 So why should you punish the folks that have
01:54:18 11 legitimate medical need for opioids or blood pressure or
01:54:21 12 insulin by just cutting them all off?

01:54:25 13 We live in a poor community where some folks walk to
01:54:29 14 the drugstore or take the bus to the drugstore. It's a
01:54:32 15 major inconvenience when you are just carte blanche cut a
01:54:35 16 doctor off for -- cut a doctor off. No more prescriptions
01:54:39 17 from Dr. Jones.

01:54:40 18 His view is that a pharmacist needs to take each
01:54:45 19 prescription as it comes to him or her, is to evaluate using
01:54:51 20 Good Faith Dispensing and make a decision based on the
01:54:54 21 prescription, not on the name of the doctor.

01:54:55 22 You recall that Agent Pavlich from the Board of
01:54:59 23 Pharmacy, what he had to say about Mr. Joyce. He said
01:55:01 24 Mr. Joyce was an excellent pharmacist. Always compliant.
01:55:05 25 Called the Board of Pharmacy if he had issues or concerns.

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Now, despite that, you might recall that Mr. Joyce was also accused by the plaintiffs of putting profits over patient safety. And I hope you remember his reaction to that charge and how offended he was as a pharmacist and a Walgreens employee to be accused of that.

Tasha Polster. She is our divisional vice president, pharmacy quality, compliance, and patient safety. She was on the stand for 3 days, and she took some pretty aggressive questioning from Mr. Lanier. But she said some things that I want to remind you about. She talked about our Good Faith Dispensing and Target Drug Good Faith Dispensing policies. All right? The policies that were targeted at helping pharmacists execute their corresponding responsibility when they filled opioid prescriptions.

Here's our policy from 1998. You can see that it says it's revised, so that's not the earliest policy, but it's the earliest policy that we have in this case. It says, the pharmacist must use the elements of Good Faith Dispensing in conjunction with the state and federal laws when they dispense controlled substances.

You saw through these Good Faith Dispensing policies that we were alerting our pharmacists to look for red flags when they encountered prescriptions for opioid medicines. And some of these will look familiar. You see there's one in there, look for unusual geographical distances between

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01:56:50 1 patient, pharmacist, and prescriber, or look for numerous
01:56:54 2 controlled prescriptions being written by the same
01:56:58 3 prescriber or numerous prescribers. All right?

01:57:01 4 Walgreens was identifying red flags for its
01:57:06 5 pharmacists to look out for diversion even before what
01:57:11 6 Mr. Lanier calls phase 1 of the opioid epidemic. Remember,
01:57:17 7 he says phase 1 began in 1999. This is our 1998 policy.
01:57:22 8 And what Mr. Lanier told you in opening was that his expert,
01:57:26 9 Mr. Catizone -- and this is a quote -- is going to say that
01:57:28 10 defendants should have had in place from the beginning, not
01:57:32 11 after they get sued, not after they get written up, but from
01:57:36 12 the very beginning, they're supposed to have red flag
01:57:39 13 policies, and they didn't.

01:57:41 14 Well, for Walgreens, at least, we know that's just not
01:57:45 15 true.

01:57:45 16 Now, we know that Walgreens -- and you've seen the
01:57:49 17 evidence through Ms. Polster -- they had these Good Faith
01:57:55 18 Dispensing policies all the way up through the current day.
01:57:56 19 And we continued to revise them and augment them. We'd
01:58:01 20 introduce new red flags to be on the lookout for when we
01:58:04 21 learned of, you know, criminals becoming more sophisticated
01:58:07 22 in their efforts to divert pills. I'm not going to spend a
01:58:11 23 lot of time on those policies here, because when you go back
01:58:13 24 to deliberate, you're going to have access to them and you
01:58:15 25 can look at them for yourselves. And when you do, I hope

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01:58:18 1 you'll ask yourself whether those policies, whether they
01:58:21 2 reflect a company that's intentionally or illegally trying
01:58:25 3 to oversupply opioids into Lake County and Trumbull County.

01:58:30 4 Now, a few other things that we learned from
01:58:34 5 Ms. Polster's testimony and the documents. You recall, she
01:58:40 6 showed you some -- showed you a document and testified that
01:58:43 7 the Walgreens stores in Lake County and in Trumbull County
01:58:46 8 dispensed generally between 10 and 20 percent controlled
01:58:49 9 substances versus non-controlled. And as Mr. Lanier said
01:58:52 10 this morning, that's below the DEA guidelines that you heard
01:58:55 11 from Mr. Rannazzisi.

01:58:58 12 She said that the cash payments for opioid
01:59:01 13 prescriptions at our stores in Lake County and Trumbull
01:59:06 14 County were all under 10 percent. Most of the time they
01:59:08 15 were much lower.

01:59:09 16 Do you recall from Mr. Catizone, that's consistent
01:59:12 17 with the national average, that about 10 percent of the
01:59:14 18 population doesn't have insured -- insurance, so you would
01:59:17 19 expect about 10 percent of your patients coming to your
01:59:24 20 pharmacy would be paying in cash.

01:59:25 21 She also told you that Walgreens isn't perfect, but
01:59:28 22 she strove to be.

01:59:32 23 I think you know pharmacists face a difficult task.
01:59:35 24 They need to dispense opioid medicines to patients who are
01:59:38 25 legitimate and need them, and they need to try to figure out

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01:59:43 1 who are the criminals who are trying get them but don't need
01:59:46 2 them. We heard about those criminals through Agent Edwards
01:59:49 3 and Captain Villanueva. And we weren't perfect.

01:59:52 4 But now you've heard the jury instructions that tell
01:59:54 5 you, the question isn't whether we were perfect; the
01:59:58 6 question is whether we were acting intentionally or
02:00:04 7 illegally, and none of the evidence supports that.

02:00:06 8 Now, along with the Walgreens' witnesses who came in,
02:00:08 9 you also learned a bit about Walgreens through the Board of
02:00:12 10 Pharmacy agents who came in and testified. That's
02:00:16 11 Agent Edwards and Agent Pavlich. Agent Edwards told you --
02:00:22 12 recall, Agent Edwards was also with the Lake County
02:00:25 13 Narcotics Agency and also with the Board of Pharmacy. And
02:00:27 14 he told you that the pharmacists at Walgreens and the chain
02:00:29 15 pharmacies, they were always helpful. They were always
02:00:32 16 helpful in providing leads for doctor shoppers or suspicious
02:00:37 17 doctors. They were a real value to the Board of Pharmacy in
02:00:41 18 trying to thwart diversion.

02:00:42 19 Mr. Pavlich said that the pharmacists at Walgreens and
02:00:45 20 the other chain pharmacies, they always cooperated with him
02:00:49 21 and his investigations and his inspections.

02:00:53 22 At the end of the day, not a single person came into
02:00:56 23 court and identified a Walgreens pharmacist who failed to do
02:00:59 24 their job or fulfill their corresponding responsibility in
02:01:04 25 Lake County or Trumbull County.

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02:01:08 1 Millions of documents produced in this litigation.
02:01:10 2 You saw no evidence, none, of a Walgreens pharmacist in
02:01:13 3 Lake County or Trumbull County with a revoked or suspended
02:01:17 4 license. No evidence of any disciplinary proceedings
02:01:22 5 against a Walgreens pharmacist in Lake or Trumbull County.
02:01:26 6 No evidence of a Walgreens pharmacy in Lake or Trumbull
02:01:30 7 County ever losing or having their license suspended.

02:01:33 8 Now, I want to take a minute to respond to a couple of
02:01:36 9 specific allegations that were lodged against us this
02:01:38 10 morning and really throughout the trial. But before I do
02:01:42 11 that, I want to clear -- I want to clear something up.

02:01:46 12 If you recall in openings, and it came up again this
02:01:49 13 morning, Mr. Lanier said a couple things that I want to
02:01:52 14 remind you about. One of the things he said in opening was
02:01:58 15 that Walgreens collected and sold patient data to a company
02:02:02 16 called IMS. He said we collected and sold data, patient
02:02:08 17 data to IMS so that IMS could turn around and sell it to
02:02:11 18 drug manufacturers for use or marketing. That's what he
02:02:14 19 told you. There was actually an entire episode in one of
02:02:18 20 his early binge watching journey called where data makes
02:02:26 21 money, is what he called it.

02:02:27 22 And then he said Walgreens did studies to figure out
02:02:30 23 how long it should take for its pharmacists to fill a
02:02:32 24 prescription. He said Walgreens wanted to make sure that
02:02:34 25 the patients had to wait long enough to go do some shopping,

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1 but no so long that they'd leave. All right? So we were
2 trying to stall patients so they'd buy from us while waiting
3 to get their prescription filled. He said we did studies on
4 that.

5 Neither one of those things is true, and in 6 weeks of
6 testimony and evidence, Mr. Lanier showed you no evidence
7 about either one. And he's not going to show you today a
8 contract between IMS and Walgreens where we're selling
9 patient data to IMS. And he's not going to show you a study
10 about how long we want our customers to wait, we want them
11 to wait long enough that they'll buy things at our store.
12 No evidence supports those allegations. And I'll leave it
13 up to you to decide why he would say those things that he
14 can't prove.

15 So now let's turn to a couple of the issues that he
16 did raise during the evidence, and he sort of touched on it
17 briefly, but I think they're worthy of response.

18 The first thing he said was we were too little too
19 late on our policies, and that was kind of a refrain that
20 you heard throughout trial. And the second thing he talked
21 about that I want to touch on is our filling for so-called
22 bad doctors, because we heard a lot about that through the
23 evidence.

24 So, too little too late on our policies. Well, you
25 saw just a couple moments ago that we had red flag policies

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1 at Walgreens all the way back to at least 1998, which,
2 again, is before phase 1 of the epidemic as plaintiffs'
3 experts have opined. It's also well before the Florida
4 settlement that Mr. Lanier kept saying was what egged us on
5 to change our policies.

6 The IntercomPlus system that you saw, that's been in
7 place since 1997.

8 Now, sure, we made improvements over the years.
9 20-plus years, of course we made improvements. I would hope
10 we did. We tuned up our policies like Good Faith
11 Dispensing. As an example, you might recall in 2012, we
12 made it a requirement that if your state had PDMPs, we had
13 to check those before you dispensed an opioid medicine.
14 Didn't matter if that was a state law or not, it was a
15 requirement of our pharmacists under our Good Faith
16 Dispensing Policy.

17 We improved our change. We upgraded our computer
18 system. We coached our pharmacists. That's what companies
19 are supposed to do. They're supposed to strive to improve.
20 None of it changes how our pharmacists have always worked
21 and the tools that they've had. A company that continually
22 improves and updates its policies and practices is not a
23 company that's acting intentionally or illegally to cause an
24 opioid crisis.

25 There was a lot of talk -- it didn't come up much this

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02:05:30 1 morning, but you heard a lot about it through trials -- or
02:05:31 2 through the trial about these so-called bad doctors that
02:05:33 3 plaintiffs said we filled for. The first one I think came
02:05:36 4 up the most. His name is Dr. Demangone. You recall his
02:05:41 5 name coming up through trial.

02:05:43 6 Dr. Demangone is the same doctor who's currently
02:05:51 7 licensed by the state medical board practicing in
02:05:55 8 Willoughby, Ohio, and doesn't have any board actions against
02:05:57 9 him. And doesn't have any board actions against him today.
02:06:01 10 And the plaintiffs haven't shown any disciplinary actions
02:06:04 11 against him or his clinic all through trial.

02:06:06 12 He also works at a clinic, Cleveland's Medical
02:06:10 13 Institute. All right? His clinic is currently licensed by
02:06:14 14 the Board of Pharmacy. And he's a pain management doctor.
02:06:17 15 So you might recall when Agent Edwards was testifying, the
02:06:20 16 pain management clinics, they get inspected more frequently
02:06:23 17 than other clinics, every 1 to 2 years they get extra
02:06:28 18 scrutiny from the Board of Pharmacy. Dr. Demangone and his
02:06:31 19 clinic are both currently licensed.

02:06:34 20 Now, Walmart and CVS, you might hear, they made a
02:06:42 21 decision at some point that they weren't going to fill
02:06:44 22 anymore for Dr. Demangone. And that's okay. But that's not
02:06:49 23 Walgreens' policy, as you've heard. Our policy is to
02:06:53 24 evaluate each prescription independently and follow Good
02:06:59 25 Faith Dispensing.

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What's important to remember here when they talk about our filling for Dr. Demangone, plaintiffs haven't shown you a single prescription that Walgreens filled for Dr. Demangone that was written for an illegitimate medical purpose. They haven't shown you that. They said we filled, but they haven't shown you a prescription that they said was for an illegitimate medical purpose. They haven't showed you a prescription that we filled for Dr. Demangone that they claim was diverted.

Now, if plaintiffs wanted to, they could have sent a subpoena out to Dr. Demangone, brought him in, cross-examined him and let you evaluate for yourselves what you thought about him and his practices. They could have brought in an expert who could have looked at the prescriptions that we filled for Dr. Demangone and told you if those prescriptions were good, bad, or otherwise. They didn't do either of those things. What they want to do is rely on innuendo and the characterization of him by the plaintiffs' lawyers. But what the plaintiffs' lawyers say isn't evidence. What I say isn't evidence. What any of us say isn't evidence. It's testimony and documents and facts that are evidence.

Dr. Veres. We heard a lot about Dr. Veres. What do we know about him?

Well, we know that he's currently licensed by the

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02:08:20 1 state medical board in Ohio. Ms. Harrington at CVS
02:08:25 2 testified to that.

02:08:26 3 We know that plaintiffs haven't shown us any evidence
02:08:29 4 that his license was ever suspended or revoked or that he
02:08:32 5 was ever subject to disciplinary proceedings by the state
02:08:36 6 board.

02:08:37 7 Now, we also know that Walgreens, and specifically
02:08:40 8 Mr. Joyce down in Trumbull County, he was aware of
02:08:44 9 Dr. Veres, and he specifically asked the folks at the state
02:08:47 10 Board of Pharmacy to check him out because we had seen a lot
02:08:51 11 of prescriptions from Dr. Veres. This was Mr. Joyce's
02:08:55 12 testimony about Dr. Veres.

02:08:56 13 He wrote a lot of controlled substances prescriptions
02:09:00 14 and I -- I asked the state board guy about him. I thought
02:09:02 15 he should look into this guy. He did, and he got back to me
02:09:06 16 that Dr. Veres kept impeccable records. He wasn't -- he
02:09:11 17 didn't give prescriptions early. He wasn't giving crazy
02:09:14 18 high doses. He maintained his staff in a good way. The
02:09:18 19 guy -- the agent visited the office a couple times.

02:09:22 20 So he didn't think that Dr. Veres was a huge or
02:09:25 21 wasn't -- wasn't anything they could do anything about, but
02:09:28 22 he was one of those doctors that you definitely wanted to
02:09:31 23 take a -- wanted to look at his prescriptions carefully.

02:09:34 24 So that's what Walgreens did. That's what it
02:09:37 25 continued to do. They continued to be careful with

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02:09:42 1 Dr. Veres's prescriptions, look at them closely, check OARRS
02:09:46 2 and follow Good Faith Dispensing.

02:09:49 3 Mr. Joyce also testified that we refused plenty of
02:09:53 4 Dr. Veres's scripts even while we filled for others. That's
02:09:57 5 not unlawful. That's not intending to cause harm.

02:10:01 6 And as with Dr. Demangone, we know that plaintiffs
02:10:05 7 haven't identified a single prescription that we filled for
02:10:08 8 Dr. Veres that they claim was written for an illegitimate
02:10:10 9 medical purpose.

02:10:12 10 Last doctor I want to touch on real briefly is
02:10:16 11 Dr. Franklin. You'll recall, he was the one who was
02:10:19 12 connected to Overholt's. He was being investigated by the
02:10:22 13 Board of Pharmacy and he was murdered. But he was under
02:10:27 14 investigation, intense investigation by the Board of
02:10:29 15 Pharmacy. And when Mr. Pavlich and Mr. Edwards came in to
02:10:33 16 testify, we asked them about Dr. Franklin. This is what
02:10:39 17 Mr. Edwards said. I asked him this question when he was on
02:10:42 18 the stand: As part of this investigation into Dr. Franklin,
02:10:46 19 did you come to the conclusion that every patient who was
02:10:48 20 going to see Dr. Franklin was a pill seeker?

02:10:52 21 Answer: No.

02:10:52 22 Were some of the patients who went to see Dr. Franklin
02:10:56 23 legitimate patients with legitimate need?

02:10:57 24 I believe so.

02:10:59 25 And I raise that because that's an important point.

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02:11:06 1 Agents who came in here from the Board of Pharmacy, they're
02:11:09 2 the ones who are on the ground who actually know the doctors
02:11:12 3 in the community. They're responsible for licensing the
02:11:15 4 pain doctors, or the clinics of the pain doctors. And they
02:11:19 5 told you even some of these so-called bad doctors, the high
02:11:22 6 prescribers, the questionable doctors, they have good
02:11:25 7 patients who need care, who need to have their prescriptions
02:11:29 8 filled.

02:11:33 9 So at the end of the day, with Dr. Demangone and
02:11:36 10 Dr. Veres, all we know is that we filled prescriptions for
02:11:40 11 two doctors who are licensed by the state and registered
02:11:43 12 with the DEA. That doesn't prove, I submit, anything.

02:11:47 13 Okay. I want to turn now to some of the failures in
02:11:53 14 plaintiffs' case, particularly when it comes to causation.

02:11:59 15 You'll see that when they were trying to put together
02:12:02 16 their causation case, they leaned pretty heavily on the
02:12:06 17 analysis of doctor -- excuse me -- Mr. Catizone, and we
02:12:10 18 heard about him this morning.

02:12:11 19 I want to be clear, Mr. Catizone was the head of the
02:12:14 20 National Association of Board of Pharmacies. That's a trade
02:12:19 21 organization. Okay? It's not the National Board of
02:12:23 22 Pharmacies. It's the national -- it's -- the state boards
02:12:26 23 come together and it's a trade organization. That's what he
02:12:30 24 was the head of. He was he never a member of any Board of
02:12:33 25 Pharmacy.

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02:12:33 1 And he acknowledged that he hasn't dispensed a
02:12:36 2 medication in 20 years or so.

02:12:38 3 You'll recall his red flag analysis. We spent a whole
02:12:41 4 lot of time, a lot of back and forth on his red flag
02:12:44 5 analysis. Here's the shortcoming with that analysis.
02:12:49 6 Nobody disputes that red flags are important. Right? We
02:12:54 7 can quibble about some of his specific red flags, whether
02:12:58 8 25 miles to a doctor is a legitimate red flag or not. But
02:13:02 9 every pharmacist who came in and testified for Walgreens and
02:13:04 10 the other pharmacies, they said they're familiar with red
02:13:11 11 flags, and that they evaluate these red flags, questions,
02:13:14 12 concerns, with every prescription. Every pharmacy had
02:13:17 13 policies that included red flags. You saw ours back to
02:13:22 14 1998.

02:13:23 15 The issue with Mr. Catizone's analysis is not that
02:13:26 16 what he calls red flags are never red flags. That's not the
02:13:29 17 problem. The problem is his insistence that they are always
02:13:33 18 red flags. And what you've heard from the pharmacists who
02:13:39 19 come in and testify is that his red flags, yeah, some of
02:13:42 20 them, they might be red flags sometimes. Paying cash, that
02:13:44 21 might be a red flag. It might not be. It depends on the
02:13:47 22 circumstances. The distance you travel to see your doctor
02:13:50 23 or go to your pharmacy, that can be a red flag, but it might
02:13:54 24 not be. It depends on too many circumstances that
02:13:57 25 Mr. Catizone couldn't capture by just applying an algorithm

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02:14:01 1 across data.

02:14:02 2 Now, Mr. Catizone did make two very important
02:14:05 3 concessions that are relevant to his analysis that I want to
02:14:08 4 remind you about. He talked about his -- all the red flags
02:14:14 5 being applied, and he was asked by Mr. Fumerton: You agree
02:14:18 6 that just because a prescription flags under one of your 16
02:14:21 7 red flags, that doesn't mean that it was written for an
02:14:24 8 illegitimate medical purpose; right?

02:14:26 9 He agreed, that's correct.

02:14:28 10 Would you also agree that it does not mean that the
02:14:31 11 medicine that was dispensed to fill that prescription was
02:14:33 12 diverted?

02:14:36 13 He said correct, I agree with that.

02:14:37 14 So just because a prescription flagged on his
02:14:41 15 methodology doesn't mean that it was written for an
02:14:44 16 illegitimate medical purpose, and obviously it doesn't mean
02:14:46 17 that it was diverted. It just meant it was a question, like
02:14:49 18 everyone -- like every pharmacist testified to. It was a
02:14:52 19 concern. It was reason to follow up.

02:14:54 20 So for Mr. Catizone, the sole issue became whether he
02:14:58 21 saw sufficient documentation to convince himself that the
02:15:03 22 pharmacists looking at the prescription had resolved that
02:15:06 23 red flag to Mr. Catizone's satisfaction.

02:15:08 24 So we talked a lot, a lot about documentation. And
02:15:12 25 there was some confusion there because at first, as you'll

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02:15:17 1 recall, Mr. Catizone said that the documentation was
02:15:20 2 required under the Controlled Substances Act. But then we
02:15:25 3 heard from the DEA witnesses who came in, Ms. Ashley and
02:15:30 4 Mr. Rannazzisi.

02:15:33 5 Ms. Ashley was asked, there's no federal requirement
02:15:36 6 to document the resolution of red flags? Is that what you
02:15:39 7 said.

02:15:40 8 Answer: To document the resolution, not that I
02:15:42 9 recall, no.

02:15:42 10 Mr. Rannazzisi, are you aware of any steps or
02:15:45 11 regulation from your time at the DEA that states that a
02:15:48 12 pharmacist must document the resolution of red flags on
02:15:51 13 prescriptions?

02:15:51 14 Answer: Again, during my time at the DEA, I don't
02:15:56 15 recall any -- any document that states that, no.

02:16:00 16 So then Mr. Catizone said, well, it's actually, it's a
02:16:03 17 state law. It's a state law requirement. But you'll
02:16:06 18 notice, he didn't show you any statutes or any regulations
02:16:09 19 from Ohio that talked about documenting resolution of red
02:16:13 20 flags.

02:16:14 21 And then we had two witnesses who had come in to
02:16:17 22 testify who could have testified about such a state law,
02:16:20 23 such a statute, such a regulation if it existed. We had the
02:16:24 24 two guys from the Board of Pharmacy come in. And it's their
02:16:28 25 job to enforce the pharmacy laws and regulations in the

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02:16:31 1 state. If there was a state law that required
02:16:34 2 documentation, they would have been asked about it and you
02:16:36 3 would have been told about it. But they didn't ask them
02:16:39 4 about that.

02:16:40 5 Nobody who came in and testified identified a specific
02:16:46 6 Ohio statute, law, regulation that requires documentation.
02:16:52 7 Okay. You didn't see it.

02:16:54 8 This is what Mr. Edwards, from the Board of Pharmacy
02:16:58 9 said about it. First of all, it's a good practice to write
02:17:04 10 down your work when you're resolving a red flag; right?

02:17:07 11 Yes, correct.

02:17:08 12 Now, there's no dispute about that. As you heard this
02:17:11 13 morning, we have it in our policy to document the resolution
02:17:13 14 of red flags.

02:17:14 15 Not necessarily required by law. Good practice.

02:17:17 16 Correct.

02:17:18 17 Okay. Now, a pharmacist could do the hard work and
02:17:21 18 the careful work to resolve a red flag but not write down
02:17:24 19 what she or he did; right?

02:17:27 20 The answer: Correct.

02:17:29 21 Now, that last line is important because in this case,
02:17:33 22 there's not evidence of inadequate due diligence or that no
02:17:38 23 due diligence was performed on the prescriptions that
02:17:42 24 Mr. Catizone looked at if there wasn't documentation. His
02:17:46 25 only point is that he can't tell if there's no

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02:17:49 1 documentation. But nobody can say whether due diligence was
02:17:52 2 performed on those prescriptions or not.

02:17:56 3 And this is important because the plaintiffs can't
02:17:59 4 claim that we're violating a law if that law doesn't exist.

02:18:05 5 Okay. So let's look a bit more at -- a bit more
02:18:08 6 closely in a bit more detail into plaintiffs' causation case
02:18:13 7 and where it fails.

02:18:15 8 As you've heard from the jury instructions, and as I
02:18:18 9 mentioned a bit earlier, in order to prevail, plaintiffs
02:18:21 10 have to prove that Walgreens was a substantial, a
02:18:27 11 substantial factor in causing the opioid epidemic in
02:18:30 12 Lake County and in Trumbull County. And Mr. Lanier talks a
02:18:34 13 lot about volume. But volume doesn't really tell you all
02:18:38 14 that much as we'll see.

02:18:40 15 So let's talk about Mr. Catizone's and Dr. McCann's
02:18:46 16 analysis for a moment. Touched on this -- Mr. Lanier
02:18:48 17 touched on this earlier.

02:18:50 18 What happened is we produced all of our dispensing
02:18:52 19 data for opioid medicines from 2006 to 2019. So 14 years
02:19:00 20 worth of data. And what they did with that is Mr. Catizone
02:19:05 21 gave his 16 red flags that he talks about, he gave those to
02:19:09 22 Dr. McCann and then Dr. McCann created algorithms so that he
02:19:13 23 could run through that data and try to catch these red
02:19:17 24 flags. And you'll recall, you know, Dr. McCann, he had to
02:19:21 25 fill in some gaps, and he made up some numbers. But at the

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02:19:24 1 end of the day his computer system spit out the results.

02:19:28 2 Right?

02:19:29 3 Dr. McCann said, okay, this is the percentage of
02:19:33 4 defendants' opioid prescriptions that hit on red flags. And
02:19:38 5 it was a little curious, but when Dr. McCann was on the
02:19:40 6 stand, Mr. Lanier didn't ask him what that percentage was.
02:19:45 7 Right? It was at cross-examination when Ms. Swift was
02:19:48 8 asking questions that she asked Dr. McCann, what is that
02:19:52 9 percentage from the defendants that hit on red flags?

02:19:58 10 Ms. Swift: So you want to figure out the percentage
02:20:01 11 of opioid prescriptions flagged for all the defendants, and
02:20:04 12 then they talk about some math. What do you get for the
02:20:07 13 percentage?

02:20:08 14 19.14 percent.

02:20:10 15 So roughly 20 percent of the prescriptions that the
02:20:14 16 defendants filled for opioid medicines hit on one of
02:20:18 17 Mr. Catizone's red flags. And then they confirmed that in
02:20:22 18 one of the drawings that there's that 19.14, you see that?
02:20:27 19 That's a flag opioid prescriptions.

02:20:32 20 So what that means is even by Mr. Catizone's analysis
02:20:36 21 and Dr. McCann's analysis, 80 percent, 80 percent of the
02:20:42 22 opioid prescriptions that we dispense weren't red flags.
02:20:47 23 They weren't concerns under Mr. Catizone's analysis. Not
02:20:52 24 even Mr. Catizone says that we should have blocked or
02:20:54 25 refused to fill that 80 percent.

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02:20:58 1 So when Mr. Lanier talks about volume, it's important
02:21:00 2 to remember that his own expert said that from our own data,
02:21:04 3 80 percent of what we dispensed was not problematic and not
02:21:07 4 a red flag.

02:21:12 5 So I put together a slide to show you how the
02:21:18 6 causation claim would work in this case using Mr. Catizone's
02:21:22 7 and Dr. McCann's analysis.

02:21:25 8 So you have on the top -- I've been linking it out to
02:21:29 9 what plaintiffs have to prove. So you have our dispensing
02:21:32 10 data here at the top. Right? That then Dr. McCann and --
02:21:39 11 or Dr. McCann and Mr. Catizone then applied the red flags,
02:21:42 12 and so they could determine which of those prescriptions are
02:21:45 13 red flags and which are not red flags. Right?

02:21:49 14 But then of the ones that are red flags, you have to
02:21:52 15 determine which of those are legitimate and which were not
02:21:57 16 legitimate. Because as Mr. Catizone told you, just because
02:22:00 17 it's a red flag doesn't mean it's illegitimate. You can
02:22:03 18 resolve a red flag. So you have to put in the buckets which
02:22:08 19 of those flags are legitimate and which are not legitimate.
02:22:15 20 Right? And then once you've determined which are not
02:22:17 21 legitimate, then they have to show -- if we dispense any
02:22:20 22 illegitimate prescriptions, did we do that knowingly or
02:22:24 23 intentionally. They have to prove that. And then they have
02:22:27 24 to show, for any of those flagged prescriptions that were
02:22:30 25 not legitimate that we knowingly dispensed, were they a

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02:22:34 1 substantial factor in the current crisis in Lake County or
02:22:42 2 Trumbull County.

02:22:42 3 Okay. That's how the causation chain works. That's
02:22:44 4 what they need to show.

02:22:45 5 So let's look at what plaintiffs actually proved.

02:22:48 6 Again, he took the dispensing data. They did the red
02:22:55 7 flags. Said 80 percent were flagged. 20 percent -- or
02:23:00 8 80 percent were not flagged and 20 percent were flagged by
02:23:04 9 Dr. McCann.

02:23:06 10 So what about this 20 percent of flagged
02:23:10 11 prescriptions? There's no witness who said that any of
02:23:12 12 those were illegitimate, only that they hit on Dr. McCann's
02:23:18 13 algorithm.

02:23:20 14 As far as we know, those 20 percent of prescriptions,
02:23:23 15 they're all legitimate. They were red flags that could have
02:23:25 16 been resolved. Certainly Mr. Catizone never said that those
02:23:32 17 20 percent were all illegitimate.

02:23:37 18 He doesn't have any idea what percentage of that
02:23:39 19 20 percent was written for a legitimate medical purpose
02:23:43 20 versus an illegitimate medical purpose. And it's
02:23:49 21 plaintiffs' burden here to prove that we knowingly dispensed
02:23:53 22 illegitimate medicines. That's their burden.

02:23:57 23 And Mr. Catizone's analysis doesn't do that. There's
02:24:00 24 not any evidence to show that some number of those were
02:24:05 25 legitimate, some number were not legitimate. And there's no

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02:24:07 1 evidence to show that if any were illegitimate, that they
02:24:11 2 were a substantial factor of any crisis in the counties
02:24:15 3 today.

02:24:19 4 You've seen the instructions, right? Plaintiffs have
02:24:23 5 to show that our conduct was a substantial factor in what's
02:24:27 6 going on in the counties today. And there's a gap in the
02:24:31 7 evidence. They can't show that we're a factor at all.

02:24:36 8 Okay. The last thing I want to talk about is to again
02:24:39 9 take a step back and look at the true causes of the opioid
02:24:45 10 crisis in Lake County and in Trumbull County.

02:24:49 11 Remember Dr. Keyes? We saw her picture earlier today.
02:24:52 12 She was the epidemiologist. And she used the analogy of a
02:24:57 13 water tap and a spigot in her testimony. You might remember
02:25:02 14 she was describing epidemiology, and she talked about that
02:25:05 15 well in London, remember, where people were contracting
02:25:10 16 cholera and the epidemiologists figured it out.

02:25:13 17 But then she came back to that analogy when she was
02:25:16 18 asked some questions by Mr. Lanier about how she said
02:25:21 19 pharmacies were the last line of defense, and then she
02:25:24 20 talked more about that spigot analogy. She said that
02:25:28 21 pharmacies were the ones who can turn off that spigot.

02:25:32 22 So this is sort of the plaintiffs' view of the world
02:25:36 23 in this case, that you have a legal supply of opioids, and
02:25:40 24 pharmacies are down there responsible for controlling the
02:25:44 25 spigot and how much comes out. But -- and, you know,

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02:25:49 1 Mr. Lanier acknowledged this earlier today, plaintiffs' own
02:25:53 2 experts and their witnesses and plaintiffs themselves, they
02:25:55 3 told you about the real causes of the opioid epidemic in
02:25:59 4 Lake County and in Trumbull County. They've told you what
02:26:02 5 the substantial factors are in their view.

02:26:08 6 Start with manufacturers. Dr. Lembke. We talked
02:26:11 7 about her this morning. She was one of the first witnesses.
02:26:14 8 She talked, you'll recall, about how companies like
02:26:18 9 Purdue Pharma had gone out and misled doctors about the
02:26:22 10 addictive nature of these medications. She didn't blame
02:26:25 11 pharmacies for the opioid problem until she got hired by
02:26:28 12 plaintiffs in this case. But she wrote a book, you saw this
02:26:31 13 morning, back in 2016, where she blamed the manufacturers,
02:26:34 14 drug dealer M.D. Right?

02:26:36 15 Dr. Keyes, the epidemiologist, she also said that
02:26:40 16 manufacturers are at fault for the opioid crisis.

02:26:43 17 So did Dr. Alexander. You saw him. He testified to
02:26:48 18 Congress about the same thing. He didn't blame the
02:26:50 19 pharmacies, he blamed the manufacturers.

02:26:52 20 So all those people claimed that the manufacturers
02:26:54 21 should have turned off or turned down that spigot years ago.

02:26:59 22 FDA. They approved every opioid medicine that we
02:27:04 23 dispense.

02:27:04 24 Dr. Keyes testified that if the DEA -- excuse me, the
02:27:09 25 FDA -- I'm missing a letter in there -- had done its job and

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02:27:13 1 manufacturers had been more responsible, there wouldn't be
02:27:15 2 an opioid crisis today.

02:27:18 3 Dr. Lembke and Dr. Alexander, they agreed. They
02:27:22 4 thought the FDA was too lax in approving these medications.
02:27:25 5 The FDA could have turned down this spigot by not approving
02:27:29 6 medicines or putting restrictions on their use. Okay?

02:27:31 7 The DEA, we've heard a lot about them. They set the
02:27:35 8 quotas for the volume of opioids that can be manufactured
02:27:38 9 every year. They also register the doctors who can write
02:27:40 10 the prescriptions for opioids. They have all this
02:27:44 11 interesting data in ARCOS that you heard about where they
02:27:47 12 can track where the pills are going and see if there's
02:27:49 13 suspicious activity.

02:27:51 14 Dr. Keyes faulted the DEA for the opioid epidemic.
02:27:56 15 Dr. Alexander told Congress that the DEA was at fault. They
02:28:00 16 could have turned off or turned down the spigot at any time.
02:28:03 17 They could have reduced quotas. They could have stopped
02:28:08 18 registering bad doctors.

02:28:09 19 Distributors. You didn't hear a lot about them in
02:28:12 20 this case. But the independent pharmacies like Overholt's
02:28:15 21 and the pill mills, if it ravaged these communities, they
02:28:19 22 need to get their supplies that comes through these
02:28:21 23 distributors. Right? Dr. Keyes said that these
02:28:23 24 distributors, they were a causal factor in the crisis in
02:28:26 25 Lake and Trumbull County.

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02:28:27 1 State Board of Pharmacy, we've talked about them.
02:28:29 2 They license doctors who write -- excuse me -- they license
02:28:32 3 the pharmacies and they police the conduct of the bad
02:28:36 4 pharmacies like Overholt's. They can turn down that spigot,
02:28:40 5 right, by not approving pharmacies or by like sniffing out
02:28:44 6 the bad ones.

02:28:45 7 The state medical board, they license the doctors who
02:28:48 8 write the prescriptions. Right? They discipline the bad
02:28:52 9 ones. They control that spigot. They can take away
02:28:55 10 licenses from the bad prescribers.

02:28:58 11 Here's the big one, the prescribers themselves, right?
02:29:01 12 We all know that it's the prescribers who control the
02:29:07 13 demand. Pharmacists don't create demand. We fill
02:29:09 14 prescriptions that are written by prescribers, and we know
02:29:11 15 the vast majority of these prescribers are good doctors.
02:29:14 16 But even good doctors, they write a lot of prescriptions.
02:29:18 17 Right? Dr. Lembke said that. Dr. Alexander said that.
02:29:22 18 Dr. Keyes said that.

02:29:23 19 Dr. Keyes said the crisis never would have happened if
02:29:26 20 the doctors didn't prescribe the way that they did.

02:29:30 21 Prescribers, they have the greatest control over the
02:29:36 22 spigot.

02:29:36 23 All right. Let's talk about pharmacies. We'll get
02:29:38 24 there. Talk about pharmacies. Not just the chain
02:29:40 25 pharmacies, it's also the independents; right? Pharmacies

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02:29:43 1 include the bad actors like Overholt's we heard about.
02:29:46 2 Nothing that Walgreens can do about Overholt's. The Board
02:29:50 3 of Pharmacy can do something about them, the DEA can, but
02:29:53 4 Walgreens can't.

02:29:56 5 Right? Those independent pharmacies, they have
02:29:59 6 control of that spigot.

02:30:00 7 But what we know is that the big problem in
02:30:03 8 Lake County and Trumbull County today is largely driven by
02:30:07 9 illegal and illicit drugs like heroin, like fentanyl, like
02:30:16 10 counterfeit pills.

02:30:19 11 Captain Villanueva, he spoke about all of these in his
02:30:22 12 testimony.

02:30:24 13 So when you look at all of this evidence and all of
02:30:27 14 these different actors, to claim that the chain pharmacies
02:30:31 15 control the spigot of all the opioids that are going down
02:30:34 16 into that basin is just not credible.

02:30:39 17 And when you think about Walgreens' role in all of
02:30:42 18 this, I want you to remember a couple of other things we
02:30:44 19 looked at. Remember when Mr. Brunner came in and he showed
02:30:49 20 you some slides on market share. Right? So you go back.
02:30:55 21 Walgreens were just one of the many, many pharmacies in the
02:30:58 22 one -- in the one spigot, we have 14 and a half percent
02:31:05 23 market share combined in Lake County and in Trumbull County.

02:31:10 24 We're 13 out of 130 pharmacies in both of those
02:31:15 25 counties.

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02:31:18 1 It's true that there can be more than one cause of a
02:31:21 2 nuisance, but the plaintiffs have to prove that Walgreens
02:31:25 3 was a substantial factor, and against all of this evidence,
02:31:30 4 they can't do that.

02:31:33 5 All right? So with that in mind, I want to conclude
02:31:36 6 by returning to the verdict form that I showed you at the
02:31:39 7 beginning, the two questions that you're going to answer
02:31:43 8 when you begin your deliberations.

02:31:44 9 The first one, again, did the counties prove, by the
02:31:48 10 greater weight of the evidence, that oversupply of legal
02:31:50 11 prescription opioids, and diversion of those opioids into
02:31:54 12 the illicit market outside of appropriate medical channels,
02:31:57 13 is a public nuisance in Lake County?

02:32:01 14 Okay. Did they prove there's oversupply, diversion,
02:32:05 15 and that that diversion is a public nuisance today?

02:32:09 16 The answer to that question is no.

02:32:13 17 You've heard that the opioid problem in Lake County
02:32:16 18 and Trumbull County today is driven by heroin, it's driven
02:32:20 19 by fentanyl, it's driven by fraudulent pills. But even if
02:32:28 20 you answer yes to that question, if you -- some of you think
02:32:31 21 the answer to that question is yes, you still have to answer
02:32:34 22 Question 2.

02:32:38 23 Did Lake County prove, or Trumbull County prove, by
02:32:41 24 the greater weight of the evidence, that any of the
02:32:44 25 following defendants -- Walgreens -- engaged in intentional

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02:32:47 1 and/or illegal conduct which was a substantial factor in
02:32:53 2 producing the public nuisance that you found exists in
02:32:56 3 Question 1?

02:32:59 4 Plaintiffs have not proved that our conduct was either
02:33:07 5 intentional or illegal as those terms have been defined for
02:33:10 6 you by the Court. And as we just went through, plaintiffs
02:33:14 7 haven't proven causation. They haven't proven that
02:33:18 8 Walgreens was a substantial factor contributing to that
02:33:21 9 nuisance, so the answer to that question also is no.

02:33:28 10 I want to thank you again for your attention, not just
02:33:31 11 today, but for the past 6 weeks, and I really do appreciate
02:33:37 12 your service on this jury.

02:33:37 13 Thank you all very much.

02:33:51 14 THE COURT: Thank you, Mr. Swanson.

02:33:53 15 We'll now have Mr. Delinsky for CVS.

02:34:18 16 MR. DELINSKY: If you all can just give me one
02:34:20 17 second to get situated.

02:34:51 18 May it please the Court, ladies and gentlemen of the
02:34:59 19 jury, did CVS and its pharmacists in Lake and Trumbull
02:35:14 20 County, by filling prescriptions written by doctors for
02:35:20 21 medicine approved by the US FDA, act so egregiously as to
02:35:33 22 harm entire communities and the public at large in the two
02:35:40 23 counties? Because plaintiffs bring a public nuisance claim,
02:35:50 24 that's the question before us, and that's the question that
02:36:00 25 Judge Polster has instructed us on.

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02:36:01 1 I think I told you when I stood up for opening
02:36:04 2 statements that I'm really bad with technology, but it's
02:36:06 3 working, so bear with me.

02:36:09 4 Here's Judge Polster's instruction on public nuisance
02:36:13 5 to us. A public nuisance is an unreasonable interference --
02:36:19 6 ongoing today -- with a right held by the public in common.

02:36:29 7 What does that mean?

02:36:30 8 Judge Polster tells us that too.

02:36:33 9 A right common to the general public is a right that
02:36:36 10 belongs to the community at large, the whole community.
02:36:40 11 It's a collective right. It's more than an individual
02:36:44 12 right. It's more than a collection of individual rights.
02:36:47 13 It's a right that runs to all of us, the whole community.

02:36:55 14 So let's return to the question: Did CVS and its
02:37:02 15 pharmacies in Lake and Trumbull County, and its pharmacists
02:37:06 16 in Lake and Trumbull County, act so egregiously so as to
02:37:12 17 harm entire communities, so as to harm the public health of
02:37:18 18 the community at large?

02:37:25 19 No. Absolutely not.

02:37:29 20 There are many reasons why. Don't have a lot of time
02:37:34 21 today, but I'll walk through the main ones, hopefully. But
02:37:37 22 let me start with where I'll -- where I'm going to end. And
02:37:44 23 in candor, this may sound familiar. It may sound familiar
02:37:49 24 because some points, some points require repeating.

02:37:57 25 It is the mission of the Ohio Board of Pharmacy and

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the US DEA to oversee pharmacies, to scrutinize them, and to protect the public. And no amount of lawyering changes the fact, no amount of excellent lawyering, changes the fact that the Ohio Board of Pharmacy has all the data, that the Ohio Board of Pharmacy is in the communities, that the agents, like Agent Pavlich and Agent Edwards, know the pharmacies and the pharmacists. It's much more than biannual inspections.

And if we learned anything from the *Holiday* case against my client, against two CVS pharmacies down in Florida, it's that law enforcement sees issues, and when they do it acts. Law enforcement took no action here. Not against CVS, not against Walgreens, not against Walmart.

Armed with all the data, armed with its presence in the community and its knowledge of the community, law enforcement found no misconduct by any CVS Pharmacy or pharmacist in Lake and Trumbull County. It just cannot be that these CVS pharmacies in the counties systemically broke the law for decades, harmed entire communities, and law enforcement didn't see it and didn't take action. That's just not possible. It cannot be.

We're not talking about a speeding infraction. That's not the allegation here. The allegation here is harm to entire communities over decades. It's not possible law enforcement didn't see it and wouldn't have taken action if

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02:40:31 1 there was any action to take.

02:40:32 2 Faced with the impossible, did the plaintiffs bring to
02:40:46 3 court residents from the counties, witnesses from the
02:40:51 4 counties who said, hey, I was there, law enforcement got it
02:40:59 5 wrong, I saw CVS engaging in misconduct. I saw, I witnessed
02:41:09 6 CVS feeding pills to people who shouldn't have gotten them.
02:41:16 7 We would expect to see residents come to court and saying
02:41:20 8 that, eyewitnesses, giving us the who, what, when, where of
02:41:25 9 what happened in these counties. Did we get any of that?
02:41:27 10 We got none of it. Not one witness on the ground came to
02:41:35 11 court and testified, I saw CVS, I saw Walmart, I saw
02:41:39 12 Walgreens engaging in misconduct in these counties. Not
02:41:45 13 one.

02:41:49 14 Instead of building a case around eyewitnesses in the
02:41:55 15 county who interacted with CVS, experienced CVS, observed
02:42:02 16 the CVS pharmacies in Lake and Trumbull County, plaintiffs
02:42:11 17 built their case around expert witnesses, paid expert
02:42:18 18 witnesses. In fairness, they have very long resumes. But
02:42:28 19 they weren't here in the counties, and they weren't able to
02:42:30 20 talk about what happened here.

02:42:36 21 Plaintiffs have the burden of proof in this case.
02:42:38 22 They haven't proved their case.

02:42:41 23 Let me just take a pause. I jumped into this a little
02:42:48 24 abruptly. Thank you. Thank you. This was a very long
02:42:58 25 trial, and we -- none of us could have asked for a more

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02:43:06 1 attentive, for a harder working jury, and for a jury,
02:43:13 2 frankly, more patient with all the lawyering. Our gratitude
02:43:21 3 for your service and your sacrifice runs very deep. So
02:43:28 4 thank you.

02:43:34 5 I want to start in a similar place where I started in
02:43:40 6 my opening statement, with some framework, a framework that
02:43:48 7 I hope makes sense to you and that I hope you can use as you
02:43:52 8 filter the evidence once you begin your deliberations.

02:43:57 9 I want to be clear at the outside, this is framing.
02:44:01 10 It's not blank. It's just a framework to consider. And
02:44:07 11 let's start with the FDA.

02:44:11 12 Brian, Mr. Swanson said it. All the medications we're
02:44:18 13 talking about here were approved by the U.S. Food and Drug
02:44:27 14 Administration.

02:44:27 15 We heard testimony from Theresa Toiga about this. And
02:44:31 16 we know more today than we did in opening statements. We
02:44:34 17 know that this approval was a decision made by a team of
02:44:43 18 medical officers, doctors -- let me look at my list --
02:44:48 19 chemists, biologists, pharmacologists, toxicologists,
02:44:52 20 statisticians, even lawyers at FDA. They don't take their
02:44:57 21 approvals lightly. That's what we learned from Ms. Toiga.

02:45:00 22 What else did we learn about FDA's approval, was that
02:45:04 23 FDA, in determining whether to approve opioid medications,
02:45:10 24 or any other medication, considered the risks. Ms. Toiga
02:45:20 25 said the FDA considered the risks of addiction, the risks of

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02:45:24 1 overdose. And the U.S. Government determined that the
02:45:27 2 medical benefits outweighed the risks and therefore approved
02:45:32 3 it.

02:45:34 4 There's more. We learned more from Ms. Toiga. We
02:45:38 5 learned that in 2013, FDA was asked to impose limits, limits
02:45:47 6 on the dose, the permissible dose of opioid medications.
02:45:53 7 Limits on the permissible duration, the length of time
02:45:57 8 people could go on opioid medications. And we learned that
02:46:02 9 FDA determined that limits were not appropriate.

02:46:10 10 DEA authorized.

02:46:16 11 What do I mean by that?

02:46:19 12 DEA determined how much of these medications could be
02:46:24 13 manufactured and put into the market each year. And these
02:46:32 14 are the amounts that the DEA approved. And what I'd like to
02:46:37 15 focus your attention on is the travel.

02:46:41 16 Blue is hydrocodone, green is oxycodone. And as you
02:46:46 17 can see, from 2003 all the way to 2013, DEA determined that
02:46:52 18 it was appropriate to increase the volume of opioid
02:47:00 19 medications that could be manufactured and put into the
02:47:02 20 market year after year after year all the way through 2013.
02:47:09 21 Then it plateaus and decreases.

02:47:14 22 We've heard a lot about volume in this case. The
02:47:17 23 volume in the first instance is authorized by DEA itself.
02:47:23 24 And from Ms. Harper-Avilla we heard that in determining this
02:47:30 25 volume, DEA specifically considers the legitimate medical

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02:47:33 1 need of the medications.

02:47:39 2 Doctor-prescribed.

02:47:45 3 My word. We can't get more basic than this, so cut me
02:47:49 4 a little slack here. But it's so important.

02:47:52 5 Neither CVS nor any of the other pharmacies were just
02:47:56 6 handing -- handing pills out to patients. In every single
02:48:02 7 instance they were filling a prescription written by a
02:48:07 8 licensed doctor.

02:48:10 9 We heard from Kerry Keyes. Doctors write the
02:48:15 10 prescription. Doctors determine the drug. Doctors
02:48:19 11 determine the dose. Doctors determine the duration.
02:48:26 12 Doctors write the prescription.

02:48:29 13 What else did we learn about the doctors?

02:48:32 14 We learned from DEA, year after year after year in
02:48:39 15 statements that they repeated, all the way through present,
02:48:42 16 that the vast, vast majority of doctors write prescriptions
02:48:46 17 legitimately. This comes from a 2006 DEA statement devoted
02:48:51 18 to the subject of pain medication. The agency recognizes
02:48:55 19 that nearly every prescription issued by a physician in the
02:48:59 20 United States is for a legitimate medical purpose in the
02:49:03 21 usual course of professional practice. Nearly every
02:49:08 22 prescription issued by a physician in the U.S. is for a
02:49:11 23 legitimate medical purpose.

02:49:16 24 Last framing point. Pharmacist's job.

02:49:26 25 When we go to a pharmacy with a prescription from our

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02:49:29 1 doctor, we expect to get it. We expect the pharmacist to
02:49:38 2 fill it. And I think we can all agree that the core job of
02:49:47 3 the pharmacist -- and we heard it from witnesses such as
02:49:49 4 Nicci Harrington from CVS -- the core job of the pharmacist
02:49:55 5 is to see to it that patients get the medicine that their
02:50:01 6 doctors say they need. That's why we have pharmacists.

02:50:11 7 That's not to say there is another obligation as well.
02:50:14 8 There is another obligation as well, and we've learned a lot
02:50:17 9 about it. The other obligation is the corresponding
02:50:19 10 responsibility to look for illegitimate prescriptions. A
02:50:27 11 pharmacist is not only there to fill the prescriptions, the
02:50:30 12 pharmacist also has a responsibility to be on the lookout
02:50:33 13 for ones that might be illegitimate. That's corresponding
02:50:35 14 responsibility, no doubt about it. And that is a critical
02:50:40 15 responsibility.

02:50:49 16 But, again, nearly every prescription's legitimate.
02:50:52 17 Nearly every one is legitimate. And a prescriptions that a
02:50:55 18 pharmacy/pharmacist may find to be illegitimate per DEA is
02:51:00 19 small, is small.

02:51:07 20 All right. Now it's my turn to talk about CVS, and
02:51:14 21 you're going to see me tapping my phone, and I think you'll
02:51:19 22 probably all appreciate why. We're on sharp time limits.
02:51:22 23 It's not that I'm checking texts.

02:51:25 24 I want to turn to CVS, and I want to turn to some
02:51:29 25 charts. Okay? And the charts teach us a lot about what the

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02:51:35 1 CVS pharmacies in Lake and Trumbull County are, and they
02:51:39 2 show -- they show us why these pharmacies are not what
02:51:44 3 plaintiffs say they are. I'm going to move through these
02:51:46 4 pretty quick. Okay?

02:51:48 5 The chart we're looking at now depicts, shows the
02:51:57 6 shared -- CVS's share of opioids dispensed in Trumbull
02:52:02 7 County using the ARCOS database. Okay. And this is
02:52:07 8 measured by MME. I'm going to come back to that in one
02:52:10 9 second. Okay? But what this shows is CVS's -- the CVS's
02:52:16 10 percent of opioids dispensed in Trumbull County is less than
02:52:20 11 6 percent. Of course meaning that more than 94 percent of
02:52:25 12 the opioids dispensed in Trumbull County come from other
02:52:28 13 pharmacies.

02:52:29 14 Okay. Now, Mr. Lanier suggested using MME, which is
02:52:34 15 the measure of strength isn't honest. He thinks we should
02:52:40 16 be using pills. I think -- I think doing it by the number
02:52:46 17 of MMEs going to the community, equalizing it for strength,
02:52:51 18 a good way to do it. He likes doing pills. To be honest, I
02:52:55 19 don't care, okay? And if you look at this document, it's
02:52:59 20 WMT-MDL-01541A, it has both. And you can look at whether we
02:53:06 21 look at pills or dosage units, whether we look at MMEs, the
02:53:10 22 percentages go up, but not that much. So whatever you think
02:53:13 23 is appropriate, I certainly don't mean to be cagey or
02:53:18 24 dishonest in any way. It just doesn't matter that much.

02:53:23 25 Now we're moving to Lake County and CVS's share of the

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02:53:28 1 opioids dispensed there are less than 18 percent. CVS has
02:53:30 2 greater presence in Lake County. But still, more than
02:53:32 3 82 percent of the opioids dispensed in Lake County come from
02:53:35 4 other pharmacies.

02:53:36 5 And then if you look at the both of the pharmacies
02:53:39 6 together -- or both of the counties together, and we've put
02:53:42 7 two databases here because we have access to two that enable
02:53:45 8 us to conduct this kind of analysis, the OARRS database and
02:53:48 9 the ARCOS database, it hovers between 10.4 percent and 11.9
02:53:59 10 percent, depending on the database. Let's just call it
02:54:00 11 11 percent. 89 percent of the opioids dispensed into Lake
02:54:04 12 and Trumbull County are coming from other pharmacies. And
02:54:06 13 why is this important? I think Mr. Swanson already told us
02:54:09 14 so.

02:54:09 15 In considering whether CVS is a substantial cause of
02:54:16 16 any community-wide harm, this is one piece. And let's step
02:54:20 17 back and remember about all the testimony we heard mostly
02:54:26 18 from plaintiffs' own experts, like Caleb Alexander and
02:54:34 19 Kerry Keyes. There are many, many, many actors who played a
02:54:37 20 role in the opioid crisis. Manufacturers. Government
02:54:44 21 agencies. Doctors. Drug cartels. But when you look at all
02:54:51 22 the -- all those external factors that have nothing do with
02:54:56 23 pharmacists, and then you look at the fact that CVS is
02:55:01 24 responsible -- or other pharmacies are responsible for
02:55:04 25 about, what, what did we call it, 89 percent of the opioids

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02:55:08 1 coming to the counties, it just doesn't add up to
02:55:11 2 substantial cause.

02:55:13 3 And there's one other piece to this, which is
02:55:18 4 Carmen Catizone only challenged 20 percent of the
02:55:25 5 prescriptions filled by CVS. So this number comes way down.
02:55:30 6 It's not an apples-to-apples fit because we're talking MMEs
02:55:35 7 here and he was talking numbers of prescriptions. But this
02:55:38 8 number is even far less than that.

02:55:41 9 We also have to consider the trend over time of the
02:55:46 10 opioid prescriptions that CVS filled.

02:55:49 11 We've all heard about the increase, okay, the increase
02:55:53 12 that runs through 2012. The increase that coincides with
02:55:58 13 DEA increasing the quota, the increase that coincides with
02:56:05 14 doctors writing more and more opioid prescriptions. We
02:56:08 15 haven't talked so much about the decrease, but CVS's
02:56:14 16 opioid -- the opioid prescriptions decrease sharply starting
02:56:19 17 in 2012. By 2019, they're lower than where they started.

02:56:28 18 Why is this important?

02:56:30 19 Judge Polster has instructed us that today, that
02:56:35 20 today, what's happening in the communities today is
02:56:37 21 important. The public nuisance claim is grounded in the
02:56:43 22 today. And at the same time that CVS prescriptions are
02:56:48 23 going down -- and we've already looked at this -- this is
02:56:53 24 that e-mail chain with Captain Villanueva, the big three,
02:56:57 25 cocaine, heroin, and fentanyl, are going up and are driving.

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02:57:07 1 And I don't think we have to take time to go through
02:57:09 2 more of these documents, but here's a similar one from the
02:57:12 3 Lake County ADAMHS Board that we looked at.

02:57:25 4 Mr. Lanier talked about heroin use, illegal opioids.
02:57:29 5 And some of his witnesses drew a connection between the use
02:57:33 6 of prescription opioids and the use of heroin. This is a
02:57:40 7 place where I ask -- where I ask you to apply your common
02:57:45 8 sense and logic as you sift through the evidence.

02:57:49 9 CVS, nor any other pharmacy, is responsible for
02:57:56 10 illegal -- the use of illegal drugs, no matter how tragic
02:58:01 11 that may be.

02:58:02 12 And I'd like to remind you of testimony from
02:58:06 13 Kerry Keyes. Professor Keyes testified that 3.5 percent of
02:58:17 14 the people who misuse prescription drugs, not who get them
02:58:23 15 from doctors and follow the instructions, people who misuse
02:58:28 16 or abuse prescription drugs, progress to heroin.
02:58:33 17 3.5 percent of people who misuse prescription drugs progress
02:58:39 18 to heroin. The percentage of people who don't misuse it,
02:58:46 19 who don't abuse it and follow their doctor's instructions is
02:58:51 20 obviously a tiny fraction of that.

02:58:57 21 This case isn't about heroin.

02:59:01 22 All right. Non-controlled medications. Let me move
02:59:06 23 through this briefly.

02:59:09 24 We talked about this in opening statements, and I
02:59:14 25 think by now we all know what non-controlled medications

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are, the blood pressure, diabetes, antibiotics and the like. And CVS's -- the CVS pharmacies in these two counties, its volume of non-controlled medications dwarfs the volume of medications it fills for the opioids. It's 18 times larger.

And if you look at the trend, the volume of the non-controlled prescriptions increase over time as well and increases right up to 2018 before it dips. So those are going up as well.

We've talked about per capita computations. The CVS pharmacies in these two counties dispensed enough non-controlled medicine to provide every man, woman, and child with 132 pills. It's a much larger volume.

Why is this important? Why are we talking about non-controlled medications in a case about opioid medications? Because this teaches us about the pharmacies. This shows that these are everyday pharmacies trying to serve the full needs of their patients, trying to fill all the prescriptions no matter what type that their doctors say they need. And this is relevant to the case.

Judge Polster has instructed us that in considering whether the burden on a right is significant or unreasonable, the social value of defendants' conduct is an appropriate consideration.

CVS was providing -- these CVS pharmacies were providing social value by seeing to it that the patients in

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03:01:19 1 these communities got all the medication, no matter what
03:01:24 2 type that their doctor said that they needed.

03:01:26 3 Let's move to CVS witnesses. I wish I had the time to
03:01:32 4 walk through in detail what each said. I don't. But
03:01:40 5 Tom Davis, Nicci Harrington, Ken Cook, they are who CVS is.
03:01:51 6 And I ask you to recall their testimony and think about it
03:01:56 7 as you sift through the issues.

03:01:58 8 Two things. Nicci Harrington -- let me just point out
03:02:02 9 two quick things before I move on. Nicci Harrington.
03:02:06 10 Ms. Harrington's the one who for 9 years has been devoted to
03:02:10 11 enhancing CVS's programs, working so hard to try to fight a
03:02:14 12 very difficult problem. And, yes, her PowerPoint says we
03:02:23 13 need to do more. I was naive to think we couldn't do more.
03:02:29 14 Isn't that exactly who we want in her position? Isn't that
03:02:34 15 who we want?

03:02:36 16 And yes, Ken Cook freaked out when he came to the
03:02:41 17 pharmacy and there was a -- there was a pill -- there were
03:02:45 18 missing pills, a few hundred pills were missing. He freaked
03:02:48 19 out. And what did he do? He called every law enforcement
03:02:51 20 agency he could think of. He called the Board of Pharmacy.
03:02:54 21 He called Lake County Narcotics, he called DEA, and they all
03:02:58 22 descended on the pharmacy. Isn't that exactly who we want
03:03:02 23 as a pharmacist, someone who takes things that seriously?

03:03:06 24 Again, I wish I could spend more time on them. I
03:03:09 25 can't. But I ask that do you consider their testimony.

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Now I want to move to the tools CVS used to put in place to try to identify illegitimate prescriptions and to monitor the dispensing of pain medications and the controlled substances at the pharmacies. And again, we're going to move quick because we heard all about this from Nicci Harrington.

Obviously, first are the pharmacists. Pharmacists are educated in pharmacy, licensed in pharmacy, required by law, and trained to exercise corresponding responsibility.

They're guided by CVS supervisors and have been all the way as far as back as Ms. Harrington could remember, and she began in the '90s. They're guided by CVS training, and we've put in steps -- some of those trainings in evidence, and they're guided by CVS policies, and we saw those policies. And plaintiffs may not like the wording of the policies, but they made one thing clear, and they always have, don't fill prescriptions if you think they may not be legitimate.

Pharmacists are the number one tool. They're the ones not only with the professional judgment at the pharmacy counter, but the ones who see the patient, talk to the patient, and possess the human information that's necessary to determine whether somebody should get the medicine that their doctor says they need. They're the number one tool.

Then we heard about RX Connect. This is the computer

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03:04:54 1 system in the pharmacies that CVS pharmacists have to use to
03:04:57 2 fill prescriptions. And as we learned, going back more than
03:05:02 3 two decades, RX Connect is populated with patient data.

03:05:10 4 What do we mean by that? For every patient, when a
03:05:13 5 pharmacist is processing the prescription, they see two
03:05:16 6 years of all the prescriptions that any CVS around the
03:05:19 7 country has filled for that patient. They see the drug, the
03:05:23 8 amount, the doctor. They see the patient's address. They
03:05:26 9 see the patient's method of patient. What they see is all
03:05:31 10 the data they need to identify red flags. Cash. Distance.
03:05:35 11 Cocktails. Overlapping prescriptions. It's all there, and
03:05:38 12 it has been there for 20 years.

03:05:44 13 You may remember Ms. Harrington saying this version of
03:05:47 14 RX Connect is the best OARRS system that CVS could possibly
03:05:51 15 build with its own data, and they put it in place 6 years
03:06:00 16 before the State of Ohio put OARRS in place. And then over
03:06:03 17 the years RX Connect evolved. There are now alerts we heard
03:06:08 18 about. Early fills. High dose alerts. Cocktail alerts.
03:06:14 19 Forgery alerts. CVS is -- right now is piloting additional
03:06:21 20 alerts.

03:06:22 21 We asked Ken Cook, do you need any more alerts, and he
03:06:25 22 said no, I have enough alerts, but we're still piloting some
03:06:29 23 more.

03:06:30 24 And we also heard about NarxCare that's now integrated
03:06:34 25 into RX Connect so that CVS Pharmacy right on the screen can

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03:06:38 1 get the information from OARRS that's filtered through
03:06:42 2 NarxCare.

03:06:42 3 Next tool, prescriber validation. Let's not lose time
03:06:50 4 here. Long story short, we've heard about this. If a
03:06:53 5 prescriber has lost his or her -- a doctor has lost his or
03:06:57 6 her license, it's been suspended, revoked, it's expired, the
03:07:01 7 prescription's blocked. Pharmacist can't fill it. Runs off
03:07:04 8 a database that CVS updates on a weekly, if not more common
03:07:10 9 basis. Just doesn't let the pharmacist fill the
03:07:11 10 prescription.

03:07:12 11 Prescriber suspension.

03:07:15 12 This is the program Nicci Harrington's group operates.
03:07:20 13 Beginning in 2012, in the wake of the *Holiday* case, CVS
03:07:25 14 built a cutting edge, first-of-its-kind program to review
03:07:31 15 doctors running algorithms through all of CVS's data four
03:07:36 16 times a year through all the doctors to see if there's any
03:07:39 17 prescribing patterns that may be a cause for concern, and
03:07:44 18 then the team investigates them. Maybe it interviews the
03:07:48 19 doctor, and it determines whether that doctor should be
03:07:51 20 suspending. And 850 doctors by now have been suspended
03:07:59 21 under this program. And once they're suspended, it's just
03:08:03 22 like prescriber validation, pharmacist goes to fill the
03:08:06 23 prescription, blocked. They can't fill it. These two
03:08:06 24 programs working in tandem are just shedding off
03:08:09 25 prescriptions that don't even reach the pharmacist. The

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pharmacist can't fill it. The most problematic ones.

Okay. And remember, this is not a program without controversy. We talked about the *Hansen* case, and that's, for those of you taking notes, CVS 04954. This was the very recent court case. CVS had suspended an Ohio licensed pain doctor practicing in Kentucky because his volume spiked and CVS was uncomfortable with it. The doctor sued CVS, and the court said -- not this court, another court in Kentucky -- said, no, CVS, you went too far, you can't suspended this doctor, you have to fill these prescriptions. This is a cutting edge program. It's not without controversy. But it's another effort by CVS to assist its pharmacists in trying to catch illegitimate prescriptions.

Store monitoring program. Another program running off algorithm. Runs four times a year across the stores, all CVS stores. Is there anything aberrational? And if there is, if there's something that might be of concern that pops in the algorithm, teams going to the store, interview the pharmacists, look at the records, figure out if there is a problem, or if there's an explanation, and if there's a problem, they fix it.

Loss prevention monitoring. A whole separate algorithm run by a whole separate team, not under Nicci Harrington, okay, that also runs an algorithm over CVS's dispensing data, and if a concern pops, there's 200

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loss prevention investigators throughout the country, they descend on the store to see if there's an issue.

Maximum allowable quantities, NAQ. Those are the limits CVS computes, again, with algorithms. There's a lot of technology here, folks. Setting limits on how much oxycodone, how much hydrocodone CVS pharmacies can order, keep in inventory, and dispense each month. And the pharmacy bumps up against that limit, no more. The limit triggers. They can't go beyond it.

So what do we see here?

We see more than one layer of protection. We see more than one screen. We see more than one filter. We see many layers of protection. We see many layers of protection each attacking the problem in different ways, often with different people.

Are any one of these programs tools, perfect? No, of course not. It's not the standard. And we've been very candid about that. Together, are they perfect? I would never say that. There's -- perfect's impossible. Extensive? Absolutely. Absolutely.

Does a company like this -- did a company like this act so egregiously so as to -- so as to harm entire communities, so as to harm the public health of the community at large? No. Absolutely not.

Too little too late? No.

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03:11:47 1 The bedrock of this system is the pharmacists and the
03:11:53 2 data component of RX Connect. Been in place for more than
03:11:58 3 two decades.

03:12:00 4 Prescriber validation, prescriber suspension, store
03:12:04 5 monitoring, in place for 9 years. 9 years, two decades.

03:12:11 6 As Judge Polster has instructed us, the case is
03:12:14 7 grounded in today. It's not too little too late.

03:12:26 8 All right. I'm going to turn away from CVS and turn
03:12:28 9 to plaintiffs' case. Plaintiffs' proof. And I want to
03:12:36 10 start with what it's not.

03:12:39 11 And, ladies and gentlemen, if you take two things
03:12:45 12 away, two things away from my argument this afternoon, this
03:12:51 13 is one of them. I'll come back to the second one. This is
03:12:54 14 one of them.

03:12:57 15 What's -- let's start with what plaintiffs' proof is
03:13:06 16 not. If CVS harmed the community, you would expect
03:13:14 17 residents to be coming to court, to testify about what they
03:13:18 18 saw CVS do, who they saw CVS give opioids to, and the harm
03:13:28 19 that ensued. It's a court case. That's what you'd expect
03:13:34 20 to see. There's none of that evidence here. None.
03:13:41 21 Absolutely none.

03:13:43 22 The closest we got was Captain Villaneuva. And
03:13:52 23 captain talked about, what's his name, Doug Winland. And we
03:13:58 24 saw a document that CVS -- that he had obtained
03:14:01 25 prescriptions from CVS, and then we learned that he was

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1 prosecuted and convicted for engaging in deception in the
2 course of getting prescriptions filled. He was prosecuted
3 for deceiving CVS and the other pharmacists where he got his
4 prescriptions filled. That's the closest we get to
5 eyewitness on the ground evidence here.

6 What plaintiffs -- what plaintiffs offer instead is
7 just that, it's something instead of proof of what actually
8 happened on the ground from the mouths of residents of the
9 communities that you might expect to see in a case.

10 Case in point, Carmen Catizone. Carmen Catizone.
11 Plaintiffs' whole case boils down to computer code, computer
12 analysis run by Carmen Catizone. And the computer analysis
13 just doesn't work. It doesn't work.

14 And let's start with what Mr. Catizone himself
15 recognized. I'm going to skip through stuff. I told you I
16 was -- there we go.

17 You agree that just because a prescription flags under
18 one of your 16 red flags, that does not mean it was written
19 for an illegitimate medical purpose; correct?

20 Correct.

21 That's Mr. Catizone's testimony. Mr. Catizone
22 acknowledges his analysis does not identify illegitimate
23 prescriptions. It identifies prescriptions that may contain
24 red flags, but it does not identify illegitimate
25 prescriptions that can't be filled. And that's just the

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beginning of the problem.

If we learned anything in this trial, it is that we can't accurately identify a red flag. We can't accurately determine if a red flag exists on a prescription without the information about a patient that is known to the pharmacist. Is the patient a regular? Is she a regular to the pharmacy? Is she employed? If so, what does she do? What's her injury? What condition is she suffering from? Why is she traveling a distance to Cleveland to see a doctor? This is all information that a pharmacist would know, but it's not information that can be captured by computer analysis. And it's information that's needed to determine if there's a real red flag on a prescription or not. If we don't have that information, we can't accurately measure if there's a red flag.

And this is what we get. We get a situation, which is what we have here -- and these are the prescriptions flagged, the prescriptions filled by CVS flagged by Mr. Catizone's analysis. His analysis flags prescriptions written by 37 percent of prescribers, of the prescribers of opioids at a time when DEA and Joe Rannazzisi is saying be on the lookout for about 1 percent of doctors who may -- who may not be writing prescriptions legitimately. It doesn't add up. His analysis just sweeps too far.

What else do we see?

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03:18:27 1 We see what Dr. Choi told us. Dr. Choi explained that
03:18:34 2 70 percent of the CVS prescriptions flagged by Mr. Catizone
03:18:43 3 were of -- were below the lowest strength benchmark sent by
03:18:49 4 the -- set by the CDC. Okay. CDC has several benchmarks.
03:18:56 5 It has benchmarks that are higher than this lowest one that
03:19:02 6 are appropriate and permissible, but 70 percent of the CVS
03:19:05 7 prescriptions flagged by Mr. Catizone were below the lowest
03:19:09 8 strength benchmark.

03:19:14 9 70 percent flagged prescriptions are low strength. It
03:19:25 10 just doesn't make sense. The analysis just doesn't work to
03:19:30 11 identify actual red flags, and that's not the only flaw.

03:19:33 12 Documentation. Documentation. Documentation.

03:19:39 13 Mr. Catizone got that wrong too. He just assumes that
03:19:45 14 if a pharmacist didn't write down a note about what she did
03:19:49 15 or he did to resolve a red flag, the pharmacist didn't
03:19:54 16 actually resolve the red flag, and that's not true. It's
03:19:57 17 not accurate. And we know this from Trey Edwards. And this
03:20:01 18 is the same testimony that Mr. Swanson showed you.

03:20:04 19 A pharmacist could do the hard work and the careful
03:20:07 20 work to resolve a red flag but not write it -- write down
03:20:10 21 what he or she did; correct?

03:20:13 22 Correct.

03:20:14 23 That doesn't mean he or she didn't do it; correct?

03:20:18 24 Yes, correct.

03:20:19 25 It continuous. This happens a lot with the old-timer

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03:20:25 1 pharmacists; right?

03:20:26 2 It happens with all of them.

03:20:33 3 All pharmacists can resolve a red flag and not
03:20:35 4 necessarily write it down.

03:20:38 5 At the bottom, those who aren't good at documenting,
03:20:43 6 it doesn't necessarily mean they aren't good at resolving
03:20:47 7 the red flag?

03:20:49 8 Correct.

03:20:50 9 Mr. Catizone's assumption that if you didn't write it
03:20:54 10 down, you didn't resolve the red flag is just wrong.

03:20:57 11 And if we go to the CVS -- his CVS numbers, his
03:21:04 12 analysis of CVS notes, we learn even more. This was the --
03:21:12 13 what Mr. Lanier used in court to summarize Mr. Catizone's
03:21:15 14 findings about CVS's notes, and you can see they're all
03:21:18 15 phrased in terms of the number of prescriptions that don't
03:21:21 16 contain notes.

03:21:23 17 But if you flip it, 1,314 do contain notes, nearly
03:21:29 18 66 percent of the CVS sample contain notes. That's a large
03:21:38 19 percentage given that Mr. Catizone flags prescriptions that
03:21:41 20 don't even contain red flags in the first place. It's a
03:21:44 21 large percentage when you indicate that he's only looking at
03:21:47 22 what he deems to be the relevant common fields -- comment
03:21:51 23 fields, and he's cutting off a swatch that he chooses not to
03:21:58 24 look at.

03:21:59 25 You may recall my cross-examination, my questioning of

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Mr. Catizone. We -- I picked two of those notes that Mr. Lanier put up on the screen that were written by CVS pharmacists and that Mr. Catizone labeled as the most alarming. And I went through with him the content of the notes. I reminded him of abbreviations, like ACME, which he had forgotten. I reminded him of what they meant. We went over how the notes reflect OARRS lookups. We went over information on the prescriptions. And in both instances -- and I only had time for two -- he agreed that the notes reflected good pharmacy work and the notes that's reflected good documentation, and those were the only two notes we could go through with him.

And let's end here with this. This was one of the prescriptions that we were talking about with him. This was one of the most alarming instances he went into the examination, he was saying, because he didn't like the caliber of the computer notes. And what we learned was when we actually looked at the prescription, we learned it was written by an emergency room. We learned that it was for only 20 tablets or a 5-day supply. And then what else did we learn when we looked at the backside? Is that the pharmacist checked OARRS before electing to fill the prescription from the emergency room for only 20 pills for only a 5-day supply.

This isn't a red flag prescription, and the fact that

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03:23:42 1 this prescription was cut up in Mr. Catizone's analysis and
03:23:50 2 identified as one of the worst examples shows just how
03:23:55 3 broken his analysis is. It shows just how broken his
03:24:02 4 analysis is.

03:24:07 5 Doctors. Dr. Demangone. Dr. Veres. We've heard
03:24:17 6 those names. And I have to speed up now unfortunately.

03:24:26 7 As you consider these doctors, as you consider what
03:24:30 8 Mr. Lanier argues about the doctors, as you consider what
03:24:35 9 documents say about the doctors and what people testified
03:24:38 10 about the doctor -- the doctors, ask these questions:

03:24:44 11 Were these doctors licensed by the State of Ohio?

03:24:56 12 Were they licensed or registered by the US DEA?

03:25:01 13 Had they ever been disciplined by either agency?

03:25:09 14 Did they hold positions in the community?

03:25:14 15 For instance, you may see in the documents that
03:25:17 16 Dr. Veres was the medical director of three nursing homes.

03:25:23 17 Were they board-certified?

03:25:29 18 Was CVS scrutinizing them and preparing documents
03:25:36 19 laying out what they were finding?

03:25:38 20 Was CVS struggling with the question about what to do,
03:25:41 21 whether to suspended?

03:25:44 22 And I would submit to you that if they were, that's a
03:25:47 23 good thing.

03:25:47 24 Did CVS ultimately stop filling their prescriptions?

03:25:57 25 And for both these doctors the answer is yes. Maybe not as

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03:26:03 1 fast as plaintiffs would like, but they stopped.

03:26:05 2 And I would just like to remind you of what Ken Cook
03:26:12 3 showed us. This is the sign posted in Dr. Demangone's
03:26:15 4 office (indicating). Do not fill prescriptions at CVS
03:26:18 5 because CVS isn't filling.

03:26:20 6 Most importantly, when we talk about these doctors,
03:26:28 7 did plaintiffs identify a single illegitimate prescription
03:26:37 8 written by any of the doctors that CVS filled wrongfully?
03:26:44 9 Did they identify a single one?

03:26:47 10 You can't decide this case in the abstract. Did they
03:26:52 11 identify with all the data a single, illegitimate
03:26:57 12 prescription written by either of these two doctors that CVS
03:27:00 13 wrongfully filled? I'll give you a preview. The answer is
03:27:03 14 no.

03:27:04 15 Finally, the *Holiday* case. The *Holiday* case. We've
03:27:19 16 heard so much throughout this trial against the *Holiday*
03:27:23 17 case -- about the *Holiday* case against two CVS pharmacies
03:27:28 18 down in Florida. We've also heard about other settlements
03:27:34 19 in other states that CVS reached with DEA. They were all
03:27:45 20 serious matters. No doubt about it. And we've heard
03:27:52 21 testimony from Tom Davis and from Nicci Harrington about
03:27:55 22 just how seriously CVS took them. But there's a truth.
03:28:06 23 There's a truth here that needs to be recognized.

03:28:12 24 The *Holiday* case involved a microscopic percentage of
03:28:19 25 CVS pharmacies. The settlements involved a tiny percentage

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of CVS pharmacies in only four other states.

Remember, Nicci Harrington told us there were 700 CVS pharmacies in Florida alone at the time of the *Holiday* case. The *Holiday* case was against only two of 700 in Florida. It did not involve 698 other CVS pharmacies in Florida. When you look nationwide at all 10,000 CVS pharmacies, the *Holiday* case concerned less than one-tenth of one percent of all CVS pharmacies. And even more to the point, the *Holiday* case and the settlements did not involve any CVS Pharmacy in Lake or Trumbull County. They did not involve any CVS Pharmacy in the State of Ohio, and there's about 380 of them. It did not involve any CVS Pharmacy in the entire midwest.

The *Holiday* case, the settlements have nothing to do with whether the pharmacies, the CVS pharmacies in Lake and Trumbull County, filled illegitimate prescriptions. It just has nothing do with it.

Now, plaintiffs say -- say the settlements show national issues, national shortcomings. They show notice of that, even though they concern work of only a small number of pharmacists in a small number of pharmacies in other places. But DEA didn't think they were illustrative of national problems. Otherwise, DEA would have taken national action, here and elsewhere. It didn't.

What the *Holiday* case does make clear is that when DEA

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sees issues, it takes action, and the fact that DEA took no action here in these counties tells us everything we need to know.

This brings us to where we began. If CVS pharmacists engaged in the egregious community harm and conduct that plaintiffs say, law enforcement would have taken action. And the fact that law enforcement didn't, supplies the answer to the question before us.

Plaintiffs say, well, Board of Pharmacy only inspected the pharmacies, only conducted routine inspections once every 2 or 3 years, but that's not the whole story, and we know it.

As Trey Edwards told us, both the Lake County Narcotics and the Ohio Board of Pharmacy were in the pharmacies constantly. They were receiving leads, collecting leads, pursuing leads, getting to know the pharmacy, the pharmacists on a first-name basis.

And as we also learned about the Board of Pharmacy, and as we also learned about DEA, each agency had extensive data. They ran analytics on the data to identify possible wrongdoing. If CVS pharmacists in Lake and Trumbull County -- counties were acting so egregiously so as to harm the public health of entire communities, over the course of decades, local law enforcement would have taken action, Board of Pharmacy would have taken action, DEA would have

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1 taken action, and no amount of paid expert testimony and no
2 amount of computer -- computer models can overcome the fact
3 that law enforcement didn't.

4 Now's the hardest point for the lawyer. And
5 Mr. Lanier referred to this. We hand the case to you.
6 There's no more advocating. It's now in your hands.

7 It's even harder for me than him because he gets to go
8 up last, and we don't get the opportunity to respond to what
9 he says. So if you see me jumping around, you'll know he
10 said something that I take issue with.

11 But the most important check here isn't any of us.
12 Frankly, we're unimportant now. The important check is you
13 as you assess plaintiffs' argument, plaintiffs' arguments,
14 as you assess the expert testimony, all the documents, as
15 you assess what Mr. Lanier says when gets up last.

16 We ask you to challenge what plaintiffs say just as
17 you should challenge what we say. We ask you to think about
18 how we might respond. And we ask you to consider the
19 framework that I've tried to layout today from FDA's
20 approval of the medicine, to DEA's approval of the volume,
21 to the licensed doctors who wrote the prescriptions, the
22 vast, vast majority of whom were doing so legitimately, to
23 the layers of tools CVS uses to try and catch illegitimate
24 prescriptions, to the fact that law enforcement never found
25 grounds for any action against any CVS Pharmacy or

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03:35:12 1 pharmacist in Lake and Trumbull County.

03:35:17 2 Our final request to you is that you filter the
03:35:22 3 evidence, you filter the arguments through this framework
03:35:28 4 and through your recollection of the entirety of the
03:35:33 5 testimony and the entirety of the evidence.

03:35:38 6 Did CVS and its pharmacists in Lake and Trumbull
03:35:46 7 Counties act so egregiously so as to harm the public health
03:35:52 8 of entire communities? Absolutely not.

03:35:59 9 Thank you.

03:36:09 10 THE COURT: All right. Thank you,
03:36:11 11 Mr. Delinsky.

03:36:12 12 All right. Ladies and gentlemen, we'll take our
03:36:15 13 mid-afternoon break. 15 minutes. And then we will have
03:36:18 14 Walmart's closing.

03:36:52 15 (Jury excused from courtroom at 3:36 p.m.)

03:36:52 16 MR. LANIER: Your Honor, I have three matters
03:36:53 17 I need to put on the record.

03:36:54 18 THE COURT: Wait a minute.

03:36:54 19 Do we have the plaintiffs' exhibits or is it still --
03:36:59 20 all right. This is a huge problem. All right. That's all
03:37:03 21 I can say. It's a huge problem.

03:37:07 22 MR. LANIER: Thank you, Your Honor.

03:37:08 23 While on the subject of huge problems, I've three
03:37:12 24 things I need to say in response to the --

03:37:14 25 THE COURT: Okay. Sit down for a minute.

03:37:15 1 MR. LANIER: Thank you.

03:37:15 2 -- in response to the closing argument that was just
03:37:19 3 done.

03:37:20 4 I'll start light and then get the heavier.

03:37:26 5 Light. I was chided in this trial for saying that I
03:37:30 6 was running out of time at various places. Mr. Delinsky
03:37:35 7 stood up in closing argument and said he only looked at two
03:37:38 8 of the prescriptions of Mr. Catizone because that's all he
03:37:41 9 had time for, when the defendants had more time than they
03:37:45 10 used in this trial. And that's just flat wrong. I'd like
03:37:49 11 to make that note on the record.

03:37:51 12 Second point. Five times he said that I had to prove
03:37:57 13 that the defendants acted egregiously, so egregiously,
03:38:01 14 egregiously, egregiously, egregiously. That's not the law.
03:38:06 15 It's not even remotely the law.

03:38:08 16 THE COURT: Well, to be fair, you got to prove
03:38:12 17 intentionally or illegally. Illegally may be worse than
03:38:15 18 egregiously. So let's just move on. All right?

03:38:17 19 MR. LANIER: And then the third -- with all
03:38:19 20 due respect, yes, I'll move on, but it's still a wrong
03:38:25 21 statement of the law.

03:38:25 22 THE COURT: Well, it --

03:38:27 23 MR. LANIER: And it's one that, frankly, I'll
03:38:29 24 deal with, but it's there, and I want it on the record.

03:38:32 25 THE COURT: As I said, egregiously may be a

03:38:35 1 lower standard than --

03:38:36 2 MR. LANIER: Intentionally?

03:38:37 3 THE COURT: -- than illegally.

03:38:38 4 MR. LANIER: Okay. But not than

03:38:40 5 intentionally, which is one of my burdens. That's okay. I

03:38:42 6 understand, Judge.

03:38:42 7 The third is the most important because it's a, in my

03:38:45 8 opinion, could easily be a game changer in this case. I

03:38:51 9 think the Court was sandbagged. I know that we were

03:38:53 10 sandbagged.

03:38:54 11 When I had Villanueva on the stand to testify about

03:38:57 12 specific prescriptions, he was not allowed to. It was

03:38:59 13 objected to. And on October 19th, on Page 10 of 285 -- or

03:39:07 14 no, actually, it's Page 2710 of the manuscript, I was trying

03:39:11 15 to get into that. You specifically would not allow me to.

03:39:15 16 You said I'm not admitting any of these -- quote, I'm not

03:39:17 17 admitting any of these documents. We're not focusing on any

03:39:21 18 prescriptions.

03:39:22 19 And so with that understanding, I didn't get into

03:39:25 20 them, and I wasn't allowed to put them on, and now I have

03:39:28 21 Mr. Delinsky up here saying I've never focused on a

03:39:31 22 prescription, I've never shown the prescriptions, I've never

03:39:34 23 shown the prescriptions filled by anybody on a bad

03:39:38 24 situation, I haven't shown, I haven't shown, I haven't

03:39:40 25 shown, I haven't shown an investigation, which Villanueva

03:39:43 1 was not allowed to go into in any depth either because of
03:39:47 2 the objection of the defendants. And so I'm absolutely
03:39:51 3 hamstrung.

03:39:52 4 I believe the Court's been sandbagged. We've
03:39:55 5 certainly be sandbagged. And for that kind of an argument
03:39:58 6 to be made when I was specifically precluded from going into
03:40:02 7 that evidence is -- is -- I don't know how you even cure it,
03:40:06 8 but if there's a way to cure it, I'd like it cured.

03:40:09 9 MR. DELINSKY: Your Honor, I'd just note that
03:40:10 10 it did come into evidence. There was -- the back page of
03:40:13 11 the OARRS report came in that showed who -- what pharmacies
03:40:18 12 filled prescriptions for Mr. Winland.

03:40:20 13 MR. LANIER: But it didn't show the
03:40:21 14 prescriptions. The prescriptions were the three pages of
03:40:23 15 the OARRS sheet that didn't allow in that showed how many
03:40:26 16 times, what the prescriptions were, what the drugs were,
03:40:29 17 when they were being filled, the trinity cocktails, and all
03:40:32 18 the rest of that mess.

03:40:36 19 MR. WEINBERGER: That was the Winland
03:40:37 20 investigation that Mr. Delinsky just got up and talked
03:40:40 21 about, which came into evidence. No, you prevented us from
03:40:46 22 showing what --

03:40:46 23 THE COURT: Mr. Delinsky, you created a
03:40:47 24 problem. How do you want to fix it, or do you want me to
03:40:50 25 fix it?

03:40:50 1 MR. WEINBERGER: Well, I mean, it's still
03:40:51 2 obvious --

03:40:52 3 THE COURT: I'll let him get up and fix it, or
03:40:54 4 I'll fix it for him.

03:40:55 5 MR. DELINSKY: Judge, I don't think I
03:40:57 6 understand what the problem is, so maybe you can define it.

03:41:00 7 THE COURT: I think you just heard the last
03:41:01 8 discussion. You want to fix it, or I'll have to fix it for
03:41:04 9 you, sir? So you got 15 minutes. Okay? We're going to
03:41:07 10 take a break.

03:41:08 11 MR. DELINSKY: But, Judge, I don't --

03:41:09 12 THE COURT: You fix it; I'll fix it for you if
03:41:11 13 you don't. All right?

03:41:12 14 MR. LANIER: Thank you, Judge.

03:41:12 15 THE COURT: If I don't get a good suggestion
03:41:14 16 from you as to how you're going to fix it, I'll come out and
03:41:18 17 fix it.

03:41:19 18 MR. LANIER: Thank you, Judge.

03:41:19 19 THE COURT: We're in recess.

03:41:21 20 (Recess was taken from 3:41 p.m. till 3:57 p.m.)

03:57:27 21 COURTROOM DEPUTY: All rise.

03:57:28 22 THE COURT: All right. Everyone can be seated
03:57:29 23 for a minute.

03:57:29 24 All right. Mr. Delinsky, do you have a suggestion?

03:57:33 25 MR. DELINSKY: Your Honor, I would like to

03:57:34 1 pass up two documents.

03:57:37 2 THE COURT: Just want to know, do you have a
03:57:39 3 suggestion as to what I should say; yes or no?

03:57:41 4 MR. DELINSKY: Judge, I don't know
03:57:42 5 understand --

03:57:42 6 THE COURT: All right. Here's what I'm going
03:57:44 7 to say. I gave you your chance. This is what I propose to
03:57:47 8 instruct the jury:

03:57:48 9 The Court and the parties all agreed before this trial
03:57:51 10 that the plaintiffs' case would not be based on evidence of
03:57:55 11 individual prescriptions and that plaintiffs would not
03:57:59 12 introduce evidence of any individual prescription they
03:58:02 13 claimed was illegitimate. The jury is therefore to
03:58:06 14 disregard what Mr. Delinsky said about the absence of
03:58:10 15 evidence of any illegitimate prescription.

03:58:13 16 MR. DELINSKY: Judge, that's just false.
03:58:14 17 We --

03:58:15 18 THE COURT: Fine.

03:58:15 19 MR. DELINSKY: We didn't agree to that. We
03:58:17 20 sent our interrogatories for them asking that, and, judge,
03:58:20 21 we had argument with you after argument with you on our
03:58:24 22 telephonic status conferences where we said that's how we're
03:58:26 23 going to pursue our defense, and you said the defense can
03:58:29 24 try it any way they wanted to. That's how plaintiffs
03:58:32 25 elected to prove this through aggregate proof. We never

03:58:35 1 agreed to that whatever. We put an interrogatory to them,
03:58:37 2 Interrogatory Number 25, asking them to identify the
03:58:40 3 illegitimate prescriptions. They chose not to identify
03:58:42 4 them. That's just an incorrect statement. If that's go in,
03:58:45 5 I ask for a mistrial. It's just not right. We didn't agree
03:58:49 6 to that, and I don't think any of the other defendants
03:58:51 7 agreed to that.

03:58:53 8 MR. MAJORAS: No.

03:58:53 9 MR. STOFFELMAYR: No, it's always been our
03:58:54 10 position that they were required to do that and it was a
03:58:57 11 fatal defect in their case that they elected not to.

03:59:02 12 MR. MAJORAS: Walmart agrees. Walmart agrees.

03:59:02 13 MR. LANIER: The problem we've got with this,
03:59:05 14 Your Honor, is --

03:59:05 15 THE COURT: I don't know what to say then.

03:59:07 16 MR. LANIER: Yeah. No, no, no. Here's the
03:59:08 17 reason we've got a problem, though. The reason we've got a
03:59:11 18 problem is because when I offered the evidence to counter
03:59:14 19 what the defendants were trying to defend the case, they put
03:59:17 20 up a roadblock, and they said -- that's why I say they
03:59:22 21 sandbagged the Court. They sandbagged you, they sandbagged
03:59:25 22 up. But they put up a roadblock and told you that you
03:59:28 23 shouldn't allow us to show any individual prescription data
03:59:30 24 when, if that's the defense they were going to raise, I
03:59:33 25 certainly was entitled to attack their defense, and I'd have

03:59:36 1 been entitled to put it in in that way. That's a classic
03:59:39 2 sandbag.

03:59:40 3 And then for Mr. Delinsky to stand up here and to make
03:59:42 4 that kind of an argument is just to rub salt into the wound
03:59:49 5 of the sandbag. I mean, I -- I'm beside myself trying to
03:59:53 6 figure out why on earth that argument would be made.

03:59:55 7 MR. DELINSKY: And, Your Honor, I'm passing up
03:59:57 8 to you two things. The first is the slide that Mr. Lanier
04:00:01 9 used this morning.

04:00:03 10 THE COURT: All right.

04:00:04 11 MR. DELINSKY: Which opened the door to this
04:00:06 12 very issue. He talked about Mr. Winland and the
04:00:10 13 prescriptions filled by the pharmacies.

04:00:12 14 Then the next thing I'm handing up to you, Your Honor,
04:00:16 15 is a highlighted transcript of the page of the testimony
04:00:19 16 from Captain Villanueva whereby Captain Villanueva makes
04:00:23 17 crystal clear that he wasn't looking at the pharmacies. He
04:00:27 18 has no opinion on whether the pharmacies did anything wrong.

04:00:31 19 We weren't precluding investigation of any
04:00:36 20 investigation of that for prescriptions that shouldn't have
04:00:38 21 been filled by the pharmacies. He testified he had never
04:00:40 22 mentioned that.

04:00:41 23 MR. LANIER: That's flat wrong, Your Honor.
04:00:42 24 He's got that testimony that he's offering you right now.

04:00:44 25 The point that I was trying to get into through Dr. --

04:00:47 1 or through Tony Villaneuva was the OARRS sheet that showed
04:00:50 2 the prescriptions. I had other experts who would have
04:00:52 3 testified about the propriety of those prescriptions and
04:00:55 4 whether or not they were a problem, and that's what I was
04:00:57 5 never allowed to do. I wasn't allowed to get in those
04:01:00 6 individual prescriptions that showed these stores filling
04:01:04 7 prescriptions that are blatantly wrong with blatant red
04:01:07 8 flags under the law.

04:01:08 9 MR. DELINSKY: And, Your Honor, every single
04:01:10 10 one of those prescriptions was in our data. It was produced
04:01:12 11 and available to them, every single one of them.

04:01:17 12 MR. WEINBERGER: Your Honor --

04:01:18 13 MR. DELINSKY: And hundreds of thousands more.

04:01:21 14 MR. WEINBERGER: Your Honor, we didn't use the
04:01:22 15 slide that you just offered to the Court.

04:01:25 16 THE COURT: What?

04:01:26 17 MR. WEINBERGER: We did not use that slide.

04:01:28 18 MR. DELINSKY: Yes, you did.

04:01:29 19 MR. WEINBERGER: It was disclosed, but it was
04:01:30 20 never --

04:01:32 21 MR. DELINSKY: Mr. Lanier referred to it --

04:01:32 22 MR. WEINBERGER: It was never used -- it was
04:01:32 23 never used in his open and close.

04:01:36 24 MS. FUMERTON: Absolutely. We discussed this
04:01:37 25 prior to -- Pete, prior to it going up, and he absolutely

04:01:40 1 discussed it in his opening.

04:01:41 2 MR. WEINBERGER: You may have discussed it.

04:01:42 3 I'm saying in his presentation he never used the slide.

04:01:46 4 MS. FUMERTON: Absolutely.

04:01:47 5 THE COURT: I don't remember seeing the slide.

04:01:48 6 MR. LANIER: I did not use the slide.

04:01:49 7 MR. DELINSKY: It was discussed, Your Honor.

04:01:50 8 MR. WEINBERGER: It doesn't make any

04:01:51 9 difference. It wasn't used.

04:01:54 10 THE COURT: It was discussed --

04:01:56 11 MR. DELINSKY: He discussed Winland in -- he

04:01:57 12 discussed Captain Villanueva's testimony on this.

04:01:59 13 THE COURT: Well, he said something about

04:02:00 14 Captain Villanueva.

04:02:01 15 MR. WEINBERGER: He never discussed that in

04:02:03 16 discussing Villanueva.

04:02:03 17 MR. DELINSKY: He mentioned the fact that

04:02:05 18 Walmart only filled lorazepam or Diazepam or one of the

04:02:10 19 muscle relaxants. Absolutely.

04:02:11 20 MR. WEINBERGER: Not with respect to the

04:02:13 21 Winland investigation.

04:02:14 22 MR. DELINSKY: That was the only one.

04:02:19 23 MR. MAJORAS: It's that same document.

04:02:19 24 (Simultaneous crosstalk.)

04:02:21 25 MR. DELINSKY: Your Honor, we have been clear

04:02:22 1 from day one --

04:02:23 2 THE COURT: All right. Well, Mr. Lanier, I'll
04:02:25 3 let you say whatever you want to say.

04:02:26 4 MR. LANIER: Okay. Thank you, Judge.

04:02:28 5 THE COURT: All right?

04:02:28 6 MR. WEINBERGER: We have one other issue --
04:02:29 7 one other issue, Your Honor.

04:02:30 8 THE COURT: You can't say -- you can't put
04:02:32 9 anything -- you can't refer to evidence that doesn't exist.

04:02:35 10 MR. LANIER: And I won't do that.

04:02:36 11 THE COURT: All right?

04:02:38 12 MR. LANIER: I don't want him to put errors in
04:02:39 13 my case. I don't want error in my case --

04:02:40 14 THE COURT: That's what I -- I didn't mean. I
04:02:43 15 meant you can -- you can say --

04:02:43 16 (Simultaneous crosstalk).

04:02:43 17 MR. LANIER: But I will.

04:02:44 18 THE COURT: -- whatever you want to say in
04:02:45 19 response to Mr. Delinsky --

04:02:45 20 MR. LANIER: I will.

04:02:46 21 THE COURT: -- but you cannot put into
04:02:48 22 evidence what's not in the trial.

04:02:50 23 MR. LANIER: I won't say something that's not
04:02:51 24 in evidence, but I will -- I will address it.

04:02:55 25 MR. WEINBERGER: Speaking of that, Your Honor,

04:02:57 1 Mr. Swanson, during his closing on behalf of Walgreens, with
04:03:01 2 respect to whether or not Walgreens sold data, said that it
04:03:11 3 was not true that Walgreens sold patient data. We know
04:03:18 4 that's an incorrect statement. We know that's a
04:03:21 5 misrepresentation.

04:03:22 6 Now, it would be one thing for him to say there's no
04:03:25 7 proof that they did, but he said specifically, it is not
04:03:29 8 true.

04:03:30 9 THE COURT: Well, there's evidence, and you
04:03:31 10 can refer to the evidence -- what the evidence in the case
04:03:34 11 is about that.

04:03:35 12 MR. WEINBERGER: Okay.

04:03:35 13 THE COURT: All right?

04:03:37 14 MR. SWANSON: There's no evidence in the case,
04:03:38 15 Your Honor.

04:03:38 16 MR. LANIER: Yes, there is.

04:03:40 17 THE COURT: Well, I think there is, so,
04:03:41 18 Mr. Lanier -- f Mr. Lanier believes there's evidence, he can
04:03:43 19 recite it.

04:03:43 20 MR. LANIER: Yep.

04:03:45 21 THE COURT: All right?

04:03:45 22 MR. SWANSON: He's not our witness, Mark.

04:03:50 23 THE COURT: Whatever.

04:03:51 24 And I think, Mr. Swanson, you also were a little loose
04:03:54 25 with one of the instructions, all right, and if Mr. Lanier

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04:03:56 1 wants to point that out, of course, he can, but ultimately
04:03:59 2 I'm going to give the instructions.

04:04:02 3 All right. Let's bring the jury in.

04:05:25 4 (Jury returned to courtroom.)

04:05:35 5 THE COURT: Okay. Please be seated, ladies
04:05:38 6 and gentlemen.

04:05:38 7 We will now have Walmart's closing by Mr. Majoras.

04:05:43 8 CLOSING ARGUMENT BY DEFENDANT WALMART

04:05:43 9 MR. MAJORAS: Thank you, Your Honor.

04:05:44 10 Good afternoon. Let me get this adjusted so it's not
04:05:54 11 too loud.

04:05:54 12 Good afternoon. On behalf of my colleagues, Tina and
04:06:00 13 Tara, who have tried this case with me, on behalf of my
04:06:02 14 client, Walmart, I want to thank all of you for your
04:06:04 15 attention that you've given to this case and the effort that
04:06:07 16 you so obviously put into it.

04:06:08 17 It's very important to all of us here to see that
04:06:12 18 attention and to understand that you are doing all you can
04:06:17 19 to understand the full extent of the evidence that's been
04:06:19 20 offered in this case.

04:06:21 21 I can't recall whether some of you may have served on
04:06:25 22 a jury before, but something that often surprises jurors the
04:06:31 23 first time they do it is we all rise when you come in. When
04:06:34 24 the judge comes in, we all rise for the judge, but we do
04:06:35 25 that for the jury. And we do that for two reasons: One, we

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04:06:39 1 are honoring your service. But importantly, we are
04:06:43 2 recognizing that you are the deciders of the facts here.
04:06:46 3 You are the decision makers here. And so when you come into
04:06:49 4 the court, just like we do when -- we do rise for the
04:06:52 5 judge -- when you come into the court, we rise for that
04:06:54 6 reason. And I want to thank you for that service.

04:06:57 7 In my discussion today, I want to do a number of
04:07:03 8 things. I want to cover a number of areas, and I'm going to
04:07:07 9 try not to repeat too much because many of the things that
04:07:10 10 you heard from Mr. Delinsky and Mr. Swanson apply to Walmart
04:07:14 11 as well. But there's something I want to talk about -- and
04:07:17 12 we've heard a lot of discussion about road maps in this
04:07:19 13 case.

04:07:19 14 I want to talk about something else that's on a map.
04:07:22 15 And it's something that every time we look out the windows
04:07:24 16 here it's so obvious to us, the importance of bridges. We
04:07:28 17 see all the bridges that cross the Cuyahoga. I think I
04:07:33 18 remember doing a boat tour of 21 bridges of Cuyahoga County
04:07:36 19 once -- of the Cuyahoga River once.

04:07:39 20 The significance is the plaintiffs, in their burden of
04:07:42 21 proof and what they have to demonstrate to you, is they've
04:07:45 22 got to bridge concepts. They've got to be able to show that
04:07:48 23 there's conduct. Then they've got to connect it to
04:07:50 24 causation. They've got to connect a number of different
04:07:53 25 things here, and it's their burden of proof do that to prove

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04:07:56 1 their case.

04:07:58 2 And I want to talk about a couple bridges in
04:08:00 3 particular that they clearly have not met. And I'll go
04:08:04 4 through that in some detail.

04:08:07 5 But first I want to think back a little bit to when I
04:08:09 6 first had a chance to address you at the start of this case.
04:08:12 7 One of the things I said to you, that you'll be doing as a
04:08:15 8 juror, you ought to do as a juror, and it's kind of odd
04:08:18 9 sounding, is listen for what you won't be hearing.

04:08:22 10 And in this case in particular, as we look at what the
04:08:26 11 plaintiffs have tried to demonstrate about the chain
04:08:29 12 pharmacies in this case, what we haven't heard is what has
04:08:34 13 actually happened in Trumbull and Lake counties,
04:08:39 14 specifically with what the plaintiff -- with what the chain
04:08:41 15 pharmacies have done. What have they done in terms of the
04:08:45 16 prescriptions they have dispensed over time? Where have
04:08:47 17 they gone? Have they been shown to go into the illicit
04:08:51 18 market? Have they been shown to be diverted?

04:08:54 19 And if you look at the list of witnesses that the
04:08:56 20 plaintiffs brought in, in particular their experts, we
04:09:00 21 shouldn't be surprised that we didn't hear any of that.
04:09:04 22 Because they didn't come in equipped do that analysis.

04:09:07 23 If we could go to slide 44, please.

04:09:17 24 So this is -- this is Dr. McCann, the math person that
04:09:22 25 the plaintiffs called.

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04:09:25 1 I said, you don't have any opinion that any of those
04:09:28 2 dosage units that are tallied up on this exhibit should not
04:09:30 3 have been dispensed in Lake and Trumbull County; correct,
04:09:34 4 sir?

04:09:34 5 He answered correct.

04:09:35 6 Let's go to our next slide.

04:09:37 7 This is Dr. Lembke. And you can't identify any
04:09:41 8 specific prescription that was filled by any of the
04:09:43 9 defendant pharmacists in Lake and Trumbull County that was,
04:09:46 10 in fact, diverted, can you?

04:09:48 11 And she answered, again, I did not look at the data at
04:09:52 12 the county level specifically in Lake and Trumbull Counties.
04:09:55 13 I looked at it in the aggregate.

04:09:58 14 Our next slide. She further testified. Question:
04:10:03 15 But in terms of examining store by store how the pharmacists
04:10:06 16 behaved and whether or not it was proper, is that your area
04:10:10 17 of testimony?

04:10:11 18 Her answer: On a store-by-store level? That is for
04:10:14 19 the other experts.

04:10:16 20 Let's look at another expert. Well, this is actually
04:10:21 21 Mr. Catizone -- or I'm sorry -- Mr. Rannazzisi. I recognize
04:10:25 22 the picture, but I got the wrong name.

04:10:26 23 Mr. Rannazzisi was asked, if we focus again on Lake
04:10:30 24 and Trumbull Counties, it's true that you have no
04:10:32 25 information that any Walmart pharmacist ever knowingly

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04:10:35 1 filled a prescription for a pill mill in either county; is
04:10:39 2 that correct?

04:10:39 3 Answer: No, I have never looked at any prescriptions
04:10:43 4 related to Lake and Trumbull County Walmart stores, no.

04:10:47 5 Next. Mr. Rannazzisi again, this is when Mr. Lanier
04:10:54 6 was questioning him. He said, do you know anything about --
04:10:57 7 I don't even know that you know the facts of our case. Do
04:10:59 8 you know anything about that?

04:10:59 9 His answer, no, sir.

04:11:04 10 One more, please.

04:11:05 11 This is -- this is Dr. Alexander, another expert the
04:11:10 12 plaintiffs brought in.

04:11:11 13 Question: Fair enough. And, Dr. Alexander, you have
04:11:14 14 no evidence that any of these defendants filled any
04:11:16 15 prescription in Lake and Trumbull County that was not
04:11:19 16 legitimate?

04:11:20 17 Answer: Well, I don't. I wasn't asked to look at
04:11:23 18 that evidence. It wasn't required for what I was asked do.
04:11:27 19 But I do not have that sort of evidence.

04:11:32 20 One more slide.

04:11:35 21 Dr. Alexander, question: You also don't have any
04:11:38 22 evidence that any prescription filled by any of these
04:11:41 23 defendants in Lake and Trumbull County was diverted and
04:11:43 24 caused harm?

04:11:45 25 His answer, again, I do not. That wasn't part of what

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04:11:48 1 I was asked to do and wasn't required for me to answer the
04:11:51 2 two questions that I was asked to answer, which were
04:11:55 3 presented earlier.

04:11:56 4 And our final slide. Not final, just of this section.

04:12:01 5 This is Dr. Keyes. And maybe you haven't said this
04:12:05 6 today -- it was a question -- maybe you haven't said this
04:12:07 7 today, or even last week, but my understanding is that in
04:12:09 8 this case you have opinions about pharmacies generally, but
04:12:12 9 not about any specific pharmacy chain or pharmacy location;
04:12:15 10 is that correct?

04:12:16 11 And her answer is, that's correct.

04:12:21 12 The plaintiffs came into this case, their experts came
04:12:23 13 into this case without knowing the information specifically
04:12:27 14 in Lake and Trumbull County. And they want you to base your
04:12:31 15 evidence on some broader set of -- I'm sorry, they want you
04:12:35 16 to base your decision on some broader set of evidence.

04:12:39 17 And as you think about the evidence, and you think
04:12:41 18 about what the plaintiffs have proven or failed to prove,
04:12:44 19 keep that in mind. They didn't come in even expecting to
04:12:48 20 offer that proof.

04:12:51 21 And I'll talk about Mr. Catizone in a moment. But
04:12:53 22 first let me go back to some of the bridges that I want to
04:12:55 23 talk about. In one of the -- the first bridges relates to
04:13:00 24 the question that you're going to have to answer on the
04:13:02 25 verdict form. This is Question No. 1.

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04:13:10 1 If you'll go to slide 1.

04:13:12 2 So this is, as we said, there's a question for both
04:13:15 3 Lake and Trumbull County, but they largely read the same.
04:13:18 4 And in answering this question, I want to focus on three key
04:13:21 5 words as you assess the evidence and make your decision.

04:13:26 6 Go to the next slide, please.

04:13:29 7 Did Lake and Trumbull County prove, by the greater
04:13:31 8 weight of the evidence, that oversupply of legal
04:13:35 9 prescription opioids and diversion of these opioids into the
04:13:39 10 illicit market outside of appropriate medical channels is a
04:13:45 11 public nuisance in Lake County?

04:13:49 12 So the first word I'd like to talk about is "is."
04:13:52 13 Simplest word on the screen. And we -- you've heard some
04:13:56 14 discussion about it already. Is means current. And as
04:13:59 15 Judge Polster's already instructed, ongoing. Is there an
04:14:02 16 ongoing public nuisance?

04:14:06 17 The second, "oversupply."

04:14:13 18 The public nuisance at issue here is -- that is on
04:14:16 19 your question is, is there currently an oversupply of
04:14:23 20 prescription opioids in these two counties that are being
04:14:25 21 diverted? It's not a question of whether there are --
04:14:29 22 the -- what we've seen certainly, obviously, some of the
04:14:32 23 harms that drug use, both legal and otherwise, have caused
04:14:35 24 in these counties. The question is, is there an oversupply
04:14:40 25 currently in these counties that the defendants are

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ultimately responsible for?

And then the final word is "diversion." Is there oversupply, and then is there diversion of that oversupply currently ongoing in these counties?

And the evidence will demonstrate that the -- the evidence will show that the plaintiffs have not demonstrated that connection in this case.

At first when you read this instruction it seems like there's a fairly obvious answer. You've heard a lot about the problems of addiction, problems of drug use in these counties. But it's not simply a question of is there a drug problem in these counties. It's a question of connecting.

Is there currently an oversupply in these counties of prescription opioids that are being diverted today?

The testimony and evidence in this case cannot be clearer, that the ongoing issues of concern in Lake and Trumbull Counties revolve around the use of illicit drugs, principally heroin and fentanyl, which is a particularly lethal drug, especially when there is no way to know how much might be present in the street dose.

Plaintiffs' witnesses told you, to the extent there is a public nuisance today, it is a crisis of illicit fentanyl imported into this country from China and Mexico and supplied by illegal drugs and dealers on the street.

Go to slide 6, please.

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04:16:13 1 This is -- this is Captain Villanueva. We heard a
04:16:21 2 little bit about illegal fentanyl. That's a problem in
04:16:24 3 Trumbull County; right?

04:16:24 4 His answer, currently it is.

04:16:30 5 Next slide.

04:16:32 6 This is from Ms. Caraway in Trumbull County.

04:16:36 7 In 2019, did you have an understanding that illicit
04:16:39 8 fentanyl was a cause of many of the harms that you've
04:16:41 9 testified to today?

04:16:43 10 Her answer, yes.

04:16:45 11 Next slide.

04:16:46 12 This is, again, Dr. Alexander.

04:16:49 13 And then you go on to say that the impact of illicit
04:16:52 14 fentanyl has been especially severe in the communities
04:16:54 15 relative to other areas in the United States; right?

04:16:57 16 He says yes.

04:16:58 17 So the impact of illicit fentanyl in Lake and Trumbull
04:17:01 18 County, in your view, has been especially severe?

04:17:04 19 His answer, yes.

04:17:07 20 Next slide.

04:17:10 21 Dr. Keyes. Question: Fentanyl is a significant cause
04:17:13 22 of the overdose burden in those two counties?

04:17:16 23 Her answer, in recent years, yes.

04:17:22 24 And then we called Professor Murphy. Professor Murphy
04:17:27 25 is the economist from the University of Chicago. And the

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reason we called in Professor Murphy is he discussed with you, is he was going to talk about oversupply. You've got to understand the reasons that that has come about. It's not simply a matter of the pills just show up, or the drugs just show up out of nowhere. There's cause -- I'm sorry, there's a demand and supply element to that. And Dr. Murphy testified about that. And he testified in particular. We go to our next slide.

He says that the increase in misuse of and mortality from illegal opioids is particular, heroin and fentanyl, which has really been a big part of the story of what we've seen in Ohio and these counties in particular, but the United States as a whole even more in the recent years.

This is a clear example of the difference between what the counties are seeing in recent times compared to what they may have seen more than a decade ago.

You've heard plaintiffs talk about the three phases of the opioid crisis. Here's a slide that you've seen in different ways.

And it shows very clearly, in the early stages of the time period they talk about, phase 1 and phase 2 that you've heard from the plaintiffs, the issue in terms of prescription opioids, but those level off. And what happens? We see the jump in the synthetic opioids, the heroin, the fentanyl. That's the problem in the counties

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04:18:55 1 today. And the plaintiffs need to bridge how you get to
04:18:59 2 those issues today as opposed to whether or not there's
04:19:03 3 actually an oversupply of prescription opioids.

04:19:07 4 Recognizing this reality, the plaintiffs strain to
04:19:16 5 imagine a bridge that connects prescription opioid use in
04:19:20 6 2010 to the illicit fentanyl overdoses in 2021. It's
04:19:25 7 exceptionally long one and has no support. If the cause of
04:19:29 8 the problem was, as plaintiffs say, an oversupply of
04:19:34 9 prescription opioids prior to 2010, they need to bridge the
04:19:39 10 earlier periods of the greatest supply to the ongoing
04:19:43 11 problems of today, the impact of the illegal drugs that have
04:19:46 12 hit the counties like a tsunami as Trumbull County's
04:19:52 13 Ms. Caraway testified.

04:19:53 14 Plaintiffs try to blame the pharmacies for the conduct
04:19:56 15 of drug dealers and other actors the pharmacies do not and
04:19:59 16 cannot control. Ask yourself, is that reasonable? It's
04:20:04 17 not.

04:20:05 18 The defendants, of course, have no role in those
04:20:08 19 illegal products, nor in the drug cartels that produce and
04:20:11 20 sell them.

04:20:13 21 Plaintiffs try to get around this with something that
04:20:15 22 has been described in a number of different ways during the
04:20:17 23 course of the trial, but seem to center on what has been
04:20:21 24 referred to as the gateway theory. Most of this comes from
04:20:25 25 plaintiffs' epidemiologist, Dr. Keyes, and a bit from

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04:20:30 1 Dr. Lembke.

04:20:32 2 They reviewed literature and concluded that prior use
04:20:33 3 of prescription opioids is associated with later use of
04:20:36 4 heroin and fentanyl. But going back to the so-called first
04:20:40 5 wave, we heard extensive evidence that it was doctors, not
04:20:44 6 pharmacists, that drove the increase in demand for
04:20:46 7 prescription opioids. Remember, there is no suggestion that
04:20:51 8 any prescription for opioids started with the pharmacists.

04:20:57 9 Doctors, not pharmacists, are the ones who are
04:20:59 10 responsible for making treatment determinations for their
04:21:02 11 patients, deciding whether to prescribe medication,
04:21:04 12 including opioids, and setting the dose and duration of
04:21:08 13 prescription opioids that patients receive. Dr. Lembke
04:21:12 14 herself told that you most doctors honestly believe that
04:21:19 15 they were writing legitimate prescriptions.

04:21:20 16 Slide 14, please.

04:21:22 17 Her testimony, in the first decade and a half of this
04:21:25 18 century, most of the doctors who were writing opioid
04:21:28 19 prescriptions thought they were writing for a legitimate
04:21:31 20 medical purpose.

04:21:35 21 Speaking of doctors, you heard a number of different
04:21:38 22 names of doctors, Drs. Demangone, Veres, and Levin. All
04:21:46 23 these doctors were licensed to practice by the State of Ohio
04:21:49 24 and registered by the DEA to prescribe opioids. The way
04:21:52 25 plaintiffs repeatedly referenced the same names suggests

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1 that plaintiffs believe that these were bad doctors who
2 wrote illegitimate prescriptions. Despite that, they have
3 never brought you any evidence of any law enforcement or
4 regulatory actions against them. And remember, you heard
5 about how Walmart stopped filling Drs. Demangone, Levin, and
6 Veres.

7 If plaintiffs believed that those doctors were the
8 worst of the worst, the 1 percent or the .1 percent,
9 whatever number you want to use, that Mr. Rannazzisi was
10 talking about, why didn't plaintiffs make them part of this
11 case rather than simply bring their names up from time to
12 time?

13 Despite all their own evidence that drug manufacturers
14 and doctors changed the practices of the entire health care
15 industry in the early phases, plaintiffs want you to blame
16 the pharmacists, not only for phase 1, but also for each of
17 the later phases, the ones involving illegal drugs like
18 heroin and fentanyl. The plaintiffs ask you to do so based
19 on the alleged gateway theory, between prescription drug use
20 and heroin use, and then a third connection between heroin
21 use and illegal fentanyl use seen in Lake and Trumbull
22 Counties today.

23 To support this allegation, Dr. Keyes testified about
24 the prevalence of prior prescription opioid use among
25 today's heroin users. But she didn't even compare that to

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04:23:16 1 the prevalence of prescription opioid use among people who
04:23:19 2 did not go on to use heroin. We heard this statistic a
04:23:24 3 little earlier from Mr. Delinsky that -- now I'm going to
04:23:27 4 flip it. She talked about there are 3.5 percent of people
04:23:32 5 who use a prescription opioid went on to try heroin. That
04:23:37 6 means 96.5 percent did not.

04:23:41 7 Is that -- is that evidence? Does that prove the
04:23:44 8 gateway that they're talking about that you can say that the
04:23:47 9 prescription opioids later led directly to the illegal use
04:23:52 10 of heroin and fentanyl that is plaguing these counties
04:23:58 11 today? It's not.

04:23:59 12 And for that reason, in looking at Question No. 1, for
04:24:02 13 both counties, Lake and Trumbull County, the answer is no,
04:24:06 14 they have not proven that the oversupply of prescription
04:24:10 15 opioids is what's causing the current ongoing public
04:24:14 16 nuisance in these two counties. If anything, what they
04:24:18 17 proved is that prescription opioids have gone down over
04:24:22 18 time.

04:24:22 19 We've seen the slides demonstrating that starting in
04:24:27 20 about 2012 the use of prescription opioids went down as
04:24:32 21 doctors became more aware of the issues, as law enforcement
04:24:35 22 was able to get better at cracking down on pill mills, as
04:24:40 23 legislation changed so that you couldn't have the internet
04:24:43 24 pharmacies over time.

04:24:45 25 So in looking at Question No. 2 -- No. 1, I'm sorry --

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04:24:48 1 looking at Question No. 1, look very closely at what you're
04:24:51 2 being asked to decide. The question is whether there is an
04:24:55 3 oversupply of prescription opioids that is currently causing
04:24:58 4 the ongoing public nuisance in these two counties. And it's
04:25:04 5 not. The evidence is abundantly clear that the issues in
04:25:06 6 those counties are the illegal drugs that have led to the
04:25:10 7 spikes in overdose deaths and the problems of addiction that
04:25:13 8 those counties are -- these two counties are facing.

04:25:16 9 You heard from both sides that theories and
04:25:23 10 associations do not prove causation. Even though they have
04:25:26 11 different backgrounds, Dr. Keyes the epidemiologist called
04:25:30 12 by the plaintiffs, and Professor Murphy, the economist,
04:25:34 13 agreed on this basic point.

04:25:36 14 Let's go to slide 17, please.

04:25:37 15 Dr. Keyes, question: Everyone always says -- and it's
04:25:43 16 true, but maybe not that interesting -- association and
04:25:46 17 causation are not the same thing, obviously; correct?

04:25:49 18 She answered, causation is a subset of associations.

04:25:53 19 Question: Some associations are causal and some are
04:25:57 20 not?

04:25:58 21 And she answered, that's right.

04:25:59 22 Then when Professor Murphy was on the stand, he was
04:26:03 23 questioned, when Dr. Keyes testified, and I believe she
04:26:05 24 wrote about in her opinion as well, she talked about
04:26:08 25 associations and causation. How does that apply to your

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04:26:11 1 analysis?

04:26:12 2 His response, well, there's two issues. One is many
04:26:16 3 of the studies she relies on are really just associations.
04:26:20 4 They look at people who abuse cocaine -- I mean, I'm
04:26:23 5 sorry -- abuse heroin and ask, what else have you done?

04:26:26 6 Well, that doesn't tell me that was a causal factor
04:26:30 7 because I have somebody who, you know, has a propensity to
04:26:34 8 abuse substances, they're going to abuse this substance and
04:26:38 9 other substances. It's not -- that's a correlation, not a
04:26:41 10 causation.

04:26:43 11 That's very important as you look at whether the
04:26:47 12 plaintiffs have been able to connect and build that bridge
04:26:50 13 between issues in the early 2000s and prescription supply in
04:26:54 14 the early 2000s to what's happening in the two counties
04:26:57 15 today.

04:26:58 16 And we also had Dr. Murphy talk to you about a variety
04:27:03 17 of other issues that lead to the supply being what it is.
04:27:07 18 Now, plaintiffs -- Mr. Lanier said, the only thing
04:27:10 19 Dr. Murphy did was he come in -- he came in and said, it's
04:27:14 20 all because north -- people in Northeastern Ohio are
04:27:17 21 suffering and that's -- that's the whole issue that he has
04:27:20 22 raised. That's not it.

04:27:23 23 Dr. Murphy looked at all of the potential issues as to
04:27:26 24 why there may be an increase in opioid use, and then
04:27:28 25 ultimately in the illicit drugs, the illegal drugs. And he

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1 looked at things such as the Part D, the Medicare Part D,
2 which made the prescription drugs less expensive and more
3 attainable. The surveys that encouraged doctors or clinics
4 to prescribe opioids because they wanted to avoid patients
5 saying that they were in pain after they were treated. And
6 yes, he looked at the socioeconomic conditions that affect
7 Northeast Ohio. And he certainly did talk about the fact
8 that that has an impact and it can't be ignored.

9 Northeast Ohioans are pretty tough. If we can't take
10 an analysis of what may lead to whether it's illegal drug
11 use or anything else, then I suggest that -- I'm not even
12 real sure what I suggest. I think living in Northeast Ohio
13 doesn't concern me that we're not going to be able to look
14 at that closely and not get offended because someone's
15 looking at those economic conditions that might have led to
16 the drug use that we see and our affecting the counties
17 today.

18 Dr. Murphy also looked at some age groups.

19 Let's go to slide 18, please. You may remember these.
20 These were the side by side.

21 But what he looked at, he said, okay, well, who's
22 getting the prescription opioids? Who are the prescription
23 opioids patients? And then what are we seeing in terms of
24 the age groups, the demographics of those who are overdosing
25 on heroin, heroin mortality? And we saw that the opioid

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prescriptions are largely going to an older demographic.

And in particular, women 51 and over were getting the opioid prescriptions in the 2001 to 2010 period.

And then as you look later, where the plaintiffs were saying you can bridge this gap, what we're really seeing, what we're seeing is that the heroin mortality is far more prevalent among more -- among younger men.

That's not any kind of a statement that younger men somehow can't handle what's happening in any kind of economic issue in this part of the country. What it's showing you is that if the plaintiffs are trying to connect where the prescription opioids are going to where the deaths we're seeing in these kind -- in the United States, it's not correlating. It's not showing that connection that the plaintiffs have to make.

The gateway theory is not one that the plaintiffs can prove. It's not one that you should be relying upon to establish the causation that the plaintiffs must show in this case.

If you look at slide 19, please.

So this is what Professor Murphy said. He said, so if somebody is looking to abuse drugs, if prescription opioids aren't available, I'll go in another direction. And one of the directions you may go in would be to initiate on illegal opioids, like heroin or fentanyl.

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04:30:28 1 And so if your analysis is limited to a link between
04:30:31 2 prescription opioids and illegal opioids, and you ignore
04:30:34 3 that other pathway, then you may just initiate on heroin or
04:30:40 4 fentanyl -- that was my add -- you're missing a very
04:30:42 5 important part of the story. You have to take that into
04:30:44 6 account to understand the overall impact.

04:30:46 7 If we go to the next slide.

04:30:49 8 This is what he ultimately showed in terms of a graph
04:30:54 9 that he presented to you where we see the increasing
04:30:58 10 mortality while the opioid shipments are going down.

04:31:05 11 This is current. This is today. We see this gap. It
04:31:09 12 is an oversupply? Have the plaintiffs demonstrated an
04:31:13 13 oversupply that is causing the issues that are being
04:31:15 14 experienced in Ohio and this these two counties?

04:31:20 15 This suggests otherwise.

04:31:23 16 Now, the second gap that the plaintiffs must bridge to
04:31:26 17 prove actual conduct by the -- the second gap plaintiffs
04:31:30 18 must bridge is to prove actual conduct by the defendants
04:31:33 19 that was either intended to cause a public nuisance or was
04:31:37 20 unlawful. We heard some discussion about this earlier from
04:31:39 21 some of the others lawyers, so I'm not going to go into it
04:31:41 22 in great detail.

04:31:43 23 But pharmacists exercising their judgment in
04:31:46 24 dispensing prescriptions written by fully licensed and
04:31:48 25 registers doctors is obviously lawful conduct. We need and

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we want professional pharmacists to carry out this critical function in our health care system. Without them, we would not be able to obtain the medication that we need and that our doctors, after carefully examining the patients, have been able to prescribe, even if it does include opioids.

As Judge Polster instructed you this morning, conduct fully authorized by statute, ordinance, or regulation cannot create a public nuisance because it is lawful conduct.

The judge also made clear that the laws of regulation apply to the dispensing of controlled substances require substantial compliance. That is not the same thing as strict or perfect compliance. Mistakes can be made. That's particularly important as we think about the judgments that a pharmacist has to make. Even Mr. Rannazzisi endorsed that concept when he was working back at the DEA and was making presentations to pharmacists.

Slide 23, please.

This was a slide that Mr. Rannazzisi used in his presentations. He says, you must use your professional -- and this is a presentation to pharmacists. You must use your professional judgment, training, and experience. We all make mistakes.

We talked about professional judgment -- or I talk about professional judgment when I first had a chance to address you at the start of this case. And that ultimately

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04:33:18 1 is what this case is about and what our pharmacists have
04:33:20 2 been doing at Walmart and what the other pharmacists that
04:33:23 3 you've heard from of the chain pharmacies. Exercising
04:33:27 4 professional judgment. Understanding the patient who is in
04:33:30 5 front of them. Understanding the community. Understanding
04:33:33 6 the doctors.

04:33:35 7 Mr. Lanier talked about Lori Militello, the Walmart
04:33:40 8 pharmacist, and said she didn't know all of the doctors in
04:33:44 9 Lake County where her Eastlake store is, and she
04:33:47 10 acknowledged that. I don't know all the doctors. She also
04:33:49 11 acknowledged, I don't know every single patient either.

04:33:52 12 But compare that to Mr. Catizone, who is the one that
04:33:56 13 talks about the red flags. These are red flags, these are a
04:33:59 14 problem. How many doctors does doctor -- does Mr. Catizone
04:34:03 15 know in Lake or Trumbull County? Zero? How many patients
04:34:11 16 has he seen coming before in him Lake or Trumbull County?
04:34:15 17 Zero.

04:34:15 18 So when we look at what the pharmacists testified
04:34:18 19 about and how they used their professional judgment
04:34:21 20 collectively between the three pharmacists, Mr. Cook and
04:34:25 21 Ms. Militello and Ms. Stossel, 60 years of experience
04:34:29 22 between them, that they're applying on a day-to-day basis
04:34:34 23 with patients and doctors that they recognize and know, and
04:34:39 24 yet, Mr. Catizone, from his office in Chicago, is going to
04:34:42 25 come in and say, no, this is how the red flags ought to be

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04:34:46 1 resolved.

04:34:47 2 And on top of that, he designs a red flag system that
04:34:50 3 he doesn't apply, he doesn't take his red flags and say,
04:34:53 4 okay, I can see there's a problem here or a problem there.
04:34:56 5 He gives it to Dr. McCann, the math guy. The math guy knows
04:35:03 6 zero doctors in any of these counties. The math guy knows
04:35:07 7 zero patients in any of these counties. And the math guy
04:35:10 8 doesn't know pharmacy. He's not a pharmacist. He can't
04:35:14 9 make any independent judgment about whether a red flag was
04:35:18 10 appropriately filled or not to fill. And, in fact,
04:35:24 11 Mr. Catizone's system is designed, it's a mechanical system
04:35:27 12 designed so that essentially, I need someone who can count
04:35:30 13 things so I'm going to give it to Dr. McCann. Dr. McCann
04:35:32 14 can count these things and he's going to say, this is where
04:35:35 15 we see a problem in these counties.

04:35:36 16 Well, let's look to some of the testimony from
04:35:40 17 Ms. Militello, the Walmart pharmacist, who was here. And we
04:35:43 18 talked with her about a couple of prescriptions that were
04:35:47 19 identified as red flags, the ones that she had filled.
04:35:51 20 Remember the one about hospice care? It had hospice right
04:35:54 21 at the top of it. It was written by a prescriber working in
04:35:59 22 the hospice business.

04:36:01 23 And Ms. Militello said, I can tell right away, what we
04:36:05 24 have here is he's putting together, or this doctor is
04:36:08 25 putting together a kit for end-of-life care. There's

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04:36:11 1 certain drugs that a patient typically needs in a hospice.
04:36:16 2 Some of those are opioids. Some of those might be benzos to
04:36:20 3 relax and help that patient go through that time in their
04:36:23 4 life.

04:36:24 5 Ms. Militello knows that right off the bat. She can
04:36:26 6 tell that's what's happening. She can tell that by looking
04:36:28 7 at the prescription, seeing hospice on it and knowing who
04:36:31 8 the doctor is. None of the experts that the plaintiffs
04:36:35 9 brought in in this case can make that kind of assessment
04:36:38 10 when they're telling you what's a red flag and what's not.
04:36:41 11 What's a resolvable red flag or not. And they don't do
04:36:46 12 that. And ultimately, Mr. Catizone has to acknowledge that
04:36:49 13 he can't tell you that any of the prescriptions that he
04:36:52 14 flagged or said should have been flagged ultimately were
04:36:55 15 diverted, or were -- I'm sorry -- were ultimately written
04:36:59 16 for something other than an appropriate medical purpose.

04:37:03 17 A couple of the other prescriptions you saw. What
04:37:05 18 about the dentist? Someone going in for dental surgery.
04:37:12 19 Written a -- something to help them relax prior to the
04:37:15 20 surgery and then a couple of additional opioids for pain
04:37:19 21 treatment afterward. That's the kind of thing that these
04:37:22 22 pharmacists know and recognize immediately upon seeing these
04:37:27 23 prescriptions, can make the judgment that this isn't a red
04:37:31 24 flag. Can be. If I see certain prescriptions, it can be a
04:37:33 25 red flag to me. If I see certain numbers that are written,

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04:37:37 1 it can be a red flag that I've got to investigate further.

04:37:41 2 But what Mr. Catizone does, and what he relies on
04:37:46 3 Dr. McCann to do, is simply say, these are red flags, and if
04:37:49 4 I don't see documentation telling me how they were resolved,
04:37:51 5 then that's a problem. That's not a problem. The problem
04:37:57 6 is if prescriptions are being filled that should not have
04:37:59 7 been filled. And the way that the plaintiffs have analyzed
04:38:03 8 red flags and presented that to you doesn't answer that
04:38:05 9 question.

04:38:08 10 I want to talk to you about some of the additional
04:38:15 11 witnesses that you heard from Walmart and also from the
04:38:18 12 plaintiffs.

04:38:21 13 Ms. Militello was the pharmacist that you heard pretty
04:38:25 14 late in the trial, one of our last witnesses. And she
04:38:29 15 talked about working at the Eastlake store and how she went
04:38:31 16 about her job, what she did. Plaintiffs have tried to boil
04:38:36 17 that down into one or two things that she did, but she was
04:38:39 18 here explaining to you what it is and what it means to
04:38:41 19 exercise the professional judgment that a pharmacist has to
04:38:44 20 exercise. And she put herself on the witness stand, even
04:38:50 21 knowing that she would get challenged on specific
04:38:52 22 prescriptions. Why did you fill this? What was your
04:38:54 23 thinking here?

04:38:57 24 And she responded. There was a set of
04:39:01 25 prescriptions -- actually, there was one that was refused

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04:39:05 1 that Ms. Militello was asked about where an individual had
04:39:08 2 come back on a number of different occasions for multiple
04:39:13 3 drugs and those prescriptions, some of which she filled.
04:39:16 4 And she explained to you, I contacted the doctor's office on
04:39:19 5 a number of different times. I ran the OARRS reports. This
04:39:22 6 is what I did to investigate what needed to be done here.

04:39:26 7 Now, you've been at this for 6 weeks, 7 weeks. You've
04:39:30 8 learned an awful lot. You've learned enough to say, are you
04:39:33 9 sure? Is that right? Or are you positive that you handled
04:39:36 10 that correctly?

04:39:37 11 And Ms. Militello said, yes, my judgment in that
04:39:40 12 situation, knowing what the doctor told me about that
04:39:42 13 patient, knowing the risk that that patient might commit
04:39:46 14 suicide that I'm hearing from the doctor, then these are
04:39:49 15 prescriptions that I'm going to fill.

04:39:51 16 Was it right or wrong to fill those prescriptions?
04:39:54 17 More importantly, was it illegal to fill those
04:39:56 18 prescriptions? These are judgments. These are judgments
04:40:00 19 that Ms. Militello made. They're judgments that pharmacists
04:40:03 20 have to make at any time, or any day as prescriptions come
04:40:06 21 in knowing the information they have and what's available to
04:40:09 22 them. And it's her diligence, her thought in doing that,
04:40:13 23 her exercise of the judgment across all of the prescriptions
04:40:17 24 that she filled. That is the behavior that we want out of
04:40:21 25 pharmacists, even if one could question a particular one of

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04:40:25 1 whether it was filled or not, or whether it should have been
04:40:27 2 filled or not.

04:40:28 3 Plaintiffs also talked to you about Mr. Nelson.
04:40:32 4 Mr. Lanier referred to Mr. Nelson as a devastating witness
04:40:35 5 for Walmart. So let's think about what Mr. Nelson talked
04:40:40 6 about at great length. And you heard the phrase cut and
04:40:44 7 paste today. I think the phrase mantra was used pretty
04:40:48 8 frequently when the plaintiffs were examining Mr. Nelson.

04:40:51 9 And what was Mr. Nelson doing when he answered
04:40:54 10 questions from pharmacists in the field about how they
04:40:57 11 should go about performing their responsibilities and
04:41:00 12 whether or not there could be a blanket refusal to fill of a
04:41:04 13 particular doctor?

04:41:05 14 Our policy is, we don't have blanket refusals to fill.
04:41:08 15 What you should do is examine every prescription that comes
04:41:10 16 before you, use your professional judgment, use the policies
04:41:14 17 that we have in place at Walmart to assess that
04:41:17 18 prescription, and make a decision about whether it could be
04:41:20 19 filled. If you don't fill it, we'll back you. If you
04:41:24 20 decide that you don't want to fill a number of
04:41:26 21 prescriptions, we'll back you there too.

04:41:28 22 Is that so controversial that the advice given is take
04:41:33 23 every prescription and look at it and evaluate it and fill
04:41:36 24 it?

04:41:38 25 Let's do a comparison. We heard Agent Edwards,

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04:41:41 1 Trey Edwards, the former Lake County Narcotics agent and the
04:41:45 2 Board of Pharmacy witness. And he talked about as, of
04:41:49 3 today's date, how to go about evaluating prescriptions.

04:41:53 4 And if we go to slide 56, please.

04:41:56 5 So on one side of this slide is going to be
04:42:01 6 Agent Edwards' testimony, and the other side is going to be
04:42:02 7 the information that Mr. Nelson wrote in his responses to
04:42:07 8 the pharmacists. On the left side, if they are still
04:42:11 9 licensed, you know, if they still carry a valid, state
04:42:14 10 medical board of Ohio license to practice and they still
04:42:16 11 have their DEA number, then you're still permitted to
04:42:19 12 practice.

04:42:21 13 What does Mr. Nelson say?

04:42:22 14 At this point, this prescriber still has all the
04:42:25 15 necessary credentials to practice medicine.

04:42:28 16 It sounds pretty similar.

04:42:30 17 Let's go to the next slide.

04:42:31 18 Advice of Mr. Edwards, use your -- Agent Edwards, use
04:42:36 19 your professional judgment.

04:42:37 20 The advice of -- and the direction from Mr. Nelson,
04:42:41 21 exercise their professional judgment, referring to the
04:42:45 22 specific policies that Walmart has in place to help guide
04:42:47 23 them in that.

04:42:48 24 Go to the next slide.

04:42:49 25 Agent Edwards, use your professional judgment on each

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04:42:54 1 individual prescription that you receive.

04:42:56 2 Mr. Nelson, the pharmacist is still allowed to refuse
04:43:00 3 to fill a prescription on an individual prescription basis.

04:43:04 4 Let's go to the next slide.

04:43:06 5 But when you're hearing from Mr. Nelson and what he
04:43:13 6 wrote the pharmacists when they're looking for advice on how
04:43:15 7 they should go about their job is exactly what Agent Edwards
04:43:19 8 is saying in 2021. Why is that so controversial? Why is
04:43:25 9 that so devastating that Mr. Nelson would offer that advice
04:43:29 10 to the pharmacists?

04:43:32 11 One of the things that the plaintiffs have talked
04:43:34 12 about is whether prescriptions -- or the blanket refusals to
04:43:39 13 fill are allowed by the Boards of Pharmacy that Mr. Nelson
04:43:43 14 talks about. And we've already heard, again, some
04:43:45 15 discussion earlier about information that a number of
04:43:49 16 Walmart witnesses had talked about in conversations they had
04:43:54 17 with Boards of Pharmacy.

04:43:58 18 And it's true that those conversations don't say
04:44:04 19 whether the Board of Pharmacy had a rule or not, but as
04:44:07 20 Judge Polster has instructed, take a look at whether that
04:44:10 21 was something when Walmart came to their policy, was that
04:44:14 22 something that guided them in their decision-making? Did
04:44:18 23 that show their intent of why they are telling their
04:44:21 24 pharmacists about Boards of Pharmacy?

04:44:22 25 Now, we heard the testimony of Debbie Mack. And we

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1 heard the testimony of Susanne Hiland. Ms. Hiland testified
2 about her personal conversations with the Board of Pharmacy
3 in Texas. She also talked about the Wisconsin action which
4 was filed against Walmart for not filling prescriptions from
5 a clinic.

6 Mr. Nelson testified about conversations his superior,
7 Mr. Coke, had with the North Carolina and the South Carolina
8 Boards.

9 And then Ms. Mack, we saw her testimony as presented
10 by video. Ms. Mack testified about her conversations with
11 the Boards of Pharmacy in Texas, Oregon, California, Idaho,
12 Nevada, Oklahoma, Kansas, New Mexico.

13 So why is Walmart's policy that there's concern about
14 Boards of Pharmacy and why is Walmart telling their
15 individual pharmacists at that point in time that we don't
16 have a blanket refusals to fill, because that is the
17 information they have. And the -- and the ultimate advice
18 on what their pharmacists should be doing is the advice that
19 any pharmacist should be able to follow and that they've
20 known since they were in pharmacy school. Use your
21 judgment. Look at issues, considerations that may concern
22 you about the prescription or about how the prescription is
23 presented to you, and then use your judgment in making that
24 decision to fill, just as Agent Edwards testified.

25 We also know from the testimony particularly that

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Ms. Hiland offered is that Walmart has -- Walmart has not only hired excellent pharmacists like Ms. Militello, but has also undertaken efforts to support its pharmacies -- pharmacists in the exercise of their judgment.

On this front, Ms. Hiland, who is a former Walmart pharmacist herself, testified about the extensive training that Walmart provides its pharmacists to supplement the education they received in pharmacy school.

We brought you Walmart's pharmacy policies. And we keep hearing about when the policies were adopted, when they came into effect. Well, look at those policies. They're in evidence. You can look at the policy manuals that were referenced during the course of the testimony here.

If we go to slide 75, please.

So we started with the Connexus, the computer system. We had great deal of testimony about the computer system and how it adapted over time and as more information became available, whether it was the PMP reports, whether it was other information that was shared, including the blanket refusals to fill, once those were permitted at Walmart, are all available at the touch of the pharmacist.

The next slide.

We have POM 912, which was issued in January of 2005. It includes indicators based on DEA Pharmacist's Manual.

We heard from Mr. Rannazzisi, I believe, that the DEA

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04:47:40 1 Pharmacist's Manual talks about indicators. It doesn't use
04:47:44 2 red flags. The same thing that Walmart had in its internal
04:47:47 3 policies.

04:47:47 4 Let's go to the next slide.

04:47:49 5 There were a number of portions of this particular
04:47:53 6 POM, this particular policy operating -- or pharmacy
04:47:57 7 operations manual that helped pharmacists looking at
04:47:59 8 indicators, what they should try to determine when there --
04:48:04 9 a prescription is presented to them.

04:48:05 10 Let's go to the next slide.

04:48:07 11 And it continues. You may recall that as some point
04:48:10 12 Ms. Hiland was saying, I want to go to another page, let me
04:48:12 13 show you another page. Well, it's all in there.

04:48:15 14 When allowed to look through it, you'll see the
04:48:18 15 materials that Walmart had in its policies available well
04:48:21 16 back to 2005, the systems available well before 2002.
04:48:25 17 Connexus was actually a second version of the computer
04:48:28 18 system that Walmart used.

04:48:30 19 Let's go to the next slide.

04:48:31 20 That in February of 2009, the POM 1311, which you
04:48:38 21 heard testimony about, expands the indicators that a
04:48:40 22 pharmacist should look at. It explains the requirements for
04:48:43 23 proper patient-prescriber relationship.

04:48:45 24 We put these POMs into evidence so that you could see
04:48:48 25 them, not just simply hear about whether they were effective

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04:48:51 1 or not effective.

04:48:53 2 Take a look at them. You'll be able to have them in
04:48:57 3 evidence when -- if your questioning what Walmart was doing
04:48:59 4 with its pharmacists and what information it was providing
04:49:03 5 to its pharmacists. Information, by the way, that someone
04:49:09 6 like Ms. Militello says, I've known about that since I
04:49:11 7 started practicing pharmacy. And you heard that from the
04:49:14 8 other pharmacists in this case.

04:49:15 9 So I want to turn now to the final bridge that the
04:49:22 10 plaintiffs have to do -- have to prove to you and have to
04:49:25 11 build, and that's causation. And we've heard about that
04:49:28 12 already. We've heard that in the second question that
04:49:33 13 you're going to be asked to answer when you go into the jury
04:49:36 14 room to deliberate is the question as to whether or not the
04:49:40 15 individual pharmacies in this case were substantial causes
04:49:43 16 of the public nuisance, if you find there is one.

04:49:47 17 And it's very important to keep in mind that it
04:49:50 18 relates to each individual defendant. There's evidence
04:49:53 19 about -- that differs among the defendants. There's
04:49:56 20 evidence that the different defendants have put into the
04:49:58 21 record that have been brought by the plaintiffs in this
04:50:00 22 case. So look closely at whether or not each of these
04:50:04 23 counties has individually been able to demonstrate that
04:50:08 24 Walmart, or any of the chain pharmacies, is a substantial
04:50:12 25 cause of a public nuisance.

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04:50:15 1 And, yes, I want to talk about them. Why wouldn't I?
04:50:23 2 It's important.

04:50:24 3 If we look at slide 82, please.

04:50:31 4 This is Mr. Glickman, who went through and did the
04:50:35 5 math, added up all of the information and the statistics and
04:50:38 6 presented them. And he had concluded that Walmart's market
04:50:41 7 share of prescription opioids was 3.15 percent. He was
04:50:46 8 asked, "Do you know if Mr. McCann -- Dr. McCann, agrees with
04:50:50 9 that calculation?"

04:50:51 10 "Yes, he does. I mean, he said so in his deposition
04:50:54 11 testimony."

04:50:54 12 Let's go to the next slide.

04:50:55 13 And this is something I showed you -- well, it's a
04:50:59 14 little bit different because we have one less defendant now,
04:51:02 15 so we've changed some of the graphic. But the importance
04:51:06 16 is -- it remains the same.

04:51:06 17 In this case, if you look at the -- Walmart's limited
04:51:10 18 presence in dispensing prescription opioids into Lake and
04:51:15 19 Trumbull County, because we've already said it's
04:51:17 20 3.15 percent, all of the defendants, together, are about
04:51:22 21 25 percent, which means about 72 percent aren't even in this
04:51:26 22 case in front of you.

04:51:27 23 Let's go to the next slide.

04:51:29 24 And then we get to a comparison to the independents.
04:51:33 25 And Mr. Lanier said, well, why are you comparing yourself to

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independents?

I think it's very important to understand that the reason to compare to independents is we know by looking at this information where problems are. We know who the bad pharmacies are. It's abundant in this slide where you see, if you do a comparison of the three largest independents in those two counties, just three stores, and you compare them to all five Walmart stores, it's about five times as much that they're selling in those stores.

And remember, pharmacies have an important role in dispensing legal opioids written for an appropriate medical purpose. We need those pharmacies doing that. The patients who have been prescribed that treatment need pharmacies to be able to do that. So simply saying someone's a pharmacy dispensing opioids doesn't answer the question. The real question when you look at oversupply is, who's putting out so much that it's shocking?

Let's go to our next slide.

We looked at oxy 30, which we've heard in the testimony is a particularly potent form of oxy and one that is very popular, if that's the right word, in the illicit markets. And look again at the comparisons to the independents, the three non-defendant independents, the ones that aren't even in this case are showing 8.7, 9.8, 17.6 percent of all -- of the oxy 30 in these counties.

Closing Argument - Majoras

04:53:04 1 Compare that to Walmart. .5 percent. .2 percent.
04:53:08 2 .1 percent. 1 percent. .1 percent. Those are the five
04:53:11 3 Walmart stores in this case.

04:53:15 4 Now, Mr. Lanier said, watch, be careful if someone's
04:53:19 5 using MME. Well, they should be using MME. A -- a pill --
04:53:26 6 an opioid pill that does not have very much potency can't be
04:53:30 7 compared to an oxy 30 or an oxy 80, which is a huge pill.
04:53:37 8 An MME allows you to assess the amount -- not only the
04:53:40 9 numbers of pills that are being dispensed, but the potency
04:53:43 10 of those pills. It's the appropriate measure, and that's
04:53:46 11 what we've shown you.

04:53:46 12 Let's go to the next slide.

04:53:48 13 So now the question is, given what Walmart has done
04:53:56 14 and given Walmart's limited presence, can it be a
04:54:00 15 substantial factor of any public nuisance that you might
04:54:05 16 find in Lake and Trumbull Counties.

04:54:07 17 Let's go to our next slide, please.

04:54:09 18 So, here, we've got two issues. So if we started with
04:54:21 19 Walmart has 3.15 percent of the prescriptions and you go to
04:54:25 20 what Mr. Catizone and Dr. McCann identified, they said this
04:54:28 21 is the sliver, this is the narrow sliver that we have
04:54:35 22 determined raises questions of what Walmart has been
04:54:37 23 dispensing into those counties, so it's not all
04:54:41 24 3.15 percent. In fact, what they determine, if you look at
04:54:43 25 the numbers, the math turns out that it's less than

Closing Argument - Majoras

1 1 percent that they even question.

2 So even taking them at full value, which we know that
3 can't be right because we saw those prescriptions, we saw
4 the hospice prescriptions, but even taking that at full
5 value, Walmart has .9 percent of the prescriptions dispensed
6 in these counties. That is a significant concern, or a
7 significant issue that you ought to be thinking about
8 because the question is, are they a substantial factor. And
9 this even understates it. Because you have to look at all
10 the other factors that we've heard about during the course
11 of the testimony in this case.

12 The manufacturers, and what the manufacturers were
13 doing or saying and marketing about the product -- about
14 their products. The question about rogue stores, like some
15 of the others that we saw that are just essentially look
16 like they're handing out a prescription opioids. The
17 illegal cartels. If you look at all of the issues, all of
18 the potential factors that may go into what the problems
19 that Trumbull and Lake County are seeing, you have to factor
20 all of those in. It's not just the pharmacies; it's all of
21 these other factors. And if you combine all that together,
22 that very small piece that the Walmart pharmacies have
23 responsibility for just among the pharmacies shrinks even
24 smaller. It's minuscule.

25 You've heard the testimony. You've seen the evidence.

Closing Argument - Majoras

1 You know where the problems are with respect to the drug
2 issues in Lake and Trumbull Counties. Walmart is not a
3 substantial factor. It's not a substantial cause of any of
4 those issues. It can't be. And that's something that you
5 need to consider as you look to answer the second question
6 that you'll be asked on the juror -- on the jury verdict
7 form, which is if you found that there is a public nuisance
8 in Question 1, is Walmart, or all of these chain pharmacies,
9 a substantial cause, a substantial factor in causing that
10 public nuisance. And the evidence in this case, and the
11 lack of evidence in this case, can point to only one
12 direction with respect to Walmart: It is not. It cannot be
13 a substantial factor in the issues that Lake and Trumbull
14 county are facing today.

15 Ladies and gentlemen, thank you. I appreciate your
16 attention. My client appreciates the attention you've given
17 throughout this case.

18 I will not be able to talk to you again. Mr. Lanier
19 will be able to talk to you. As I said, look at -- make
20 sure you see what the evidence is. You'll be able to look
21 at the evidence when you're back in the jury room. It's not
22 a matter of who's arguing the best or whose telling you what
23 happened. Look at the evidence. That's why there are a
24 number of folks on the jury so that collectively you can
25 look at the evidence and reach the conclusions based on the

Closing Argument - Majoras/Closing in Rebuttal by Plaintiffs - Lanier

04:57:36 1 evidence in this case. And the evidence in this case will
04:57:38 2 lead you to the conclusion that on Question No. 1 there is
04:57:42 3 not an oversupply of prescription opioids causing diversion
04:57:47 4 in Lake and Trumbull County currently, ongoing, but even if
04:57:50 5 you get there, Walmart cannot be a substantial factor in
04:57:54 6 causing the nuisance that those counties may be facing.

04:58:01 7 Thank you.

04:58:10 8 MR. LANIER: Your Honor, with your permission,
04:58:11 9 it will take me just a moment to move their stuff out of the
04:58:13 10 way and start mine. If I could --

04:58:15 11 THE COURT: Okay. Very well.

04:58:19 12 Thank you, Mr. Majoras.

04:58:21 13 MR. MAJORAS: Thank you.

04:58:22 14 MR. LANIER: Yeah, I'll need Mr. -- I'll need
04:58:24 15 them to bring in and you then I'll also -- I'll try and move
04:58:29 16 this and then we need the iTiVo set up.

04:58:42 17 (Brief pause in proceedings).

05:00:22 18 MR. LANIER: Your Honor, I've got 30 minutes?

05:00:24 19 THE COURT: Very good, Mr. Lanier.

05:00:25 20 CLOSING ARGUMENT IN REBUTTAL BY THE PLAINTIFFS

05:00:25 21 MR. LANIER: If it please the Court, ladies
05:00:27 22 and gentlemen -- oh, I need a microphone.

05:00:30 23 May it please the Court, ladies and gentlemen, y'all
05:00:37 24 win the "Patience of the Year Award." Thank you so much.
05:00:40 25 I'm sorry I've got 30 minutes to go. I couldn't have asked

Closing in Rebuttal by Plaintiffs - Lanier

05:00:43 1 Mr. Majoras to give me a better speech. I've been waiting
05:00:45 2 to bring in my bridge. And he challenged me to build a
05:00:49 3 bridge. Oh, I got a bridge. And he wants the bridge on
05:00:53 4 causation. And he wants to stand up here and say, but we
05:00:57 5 did such a little bit in the county. Of course, never mind
05:01:00 6 the fact that they had all those stores dotted right outside
05:01:03 7 the county that they're not counting. But be that as it
05:01:07 8 may, this is my LEGO bridge. And it's made up of hundreds
05:01:13 9 of LEGOs I suspect. I haven't really counted. Don't know
05:01:18 10 for sure. But a lot.

05:01:19 11 Now, I built -- I had this bridge built by my guys
05:01:25 12 because when I walk out of the courthouse every day or walk
05:01:28 13 through the courthouse, I see this bridge right across there
05:01:31 14 or across the Cuyahoga River. And I thought, boy, what a
05:01:39 15 splendid illustration for this case. Because the defendants
05:01:42 16 are saying, especially Walmart, hey, we only put in, like,
05:01:46 17 6 percent, or 2 percent, or 5 percent, depends on what it is
05:01:51 18 of the opioids in the county. How can we be a significant
05:01:54 19 part of the problem?

05:01:56 20 I thought, you know, that bridge has been built on
05:02:02 21 trestles. And mercy, the entire community drives over it
05:02:06 22 all the time, or a portion of the community, just confident
05:02:12 23 that the people who made the steel trestles did so up to
05:02:17 24 code, up to snuff.

05:02:21 25 And you know, if they didn't, or let's say they did

Closing in Rebuttal by Plaintiffs - Lanier

1 90 percent of them up to snuff, or 95 percent but two or
2 three of them are rotten. If they're in the wrong place,
3 the community that's driving over that bridge, if you just
4 take out a couple (indicating), everything can fall.

5 You can't say just because you're only two of the
6 bricks -- and I nudged it a little bit. I wanted to make
7 sure it fell for y'all. I got to be honest here, right? My
8 candor to the tribunal. I didn't nudge it much, but I did
9 hit it with the top of my finger accidentally on the top.
10 So -- so but as we were pulling those things out, you take
11 something out, and it's a question of whether or not it's
12 significant.

13 And so I listened to 3 hours, and I was very
14 frustrated because I have about -- Your Honor, about a
15 2-hour rebuttal here and you've given me 30 minutes and I've
16 spent 5 of it on the bridge, but I know that people know
17 this. This is common sense. You know, this is why, with
18 Murphy, their economist expert fellow, I used this study
19 with him. And we did the math. The study shows this is
20 implications of county-level variation in opioid
21 distribution and the adjusted models show a one-pill
22 increase in PC -- this is per capita pill volume -- a
23 one-pill increase was associated with a .2 percent increase
24 in ORDs -- ORDs are opioid related deaths -- per 100,000
25 population.

Closing in Rebuttal by Plaintiffs - Lanier

05:04:22 1 So if you've got 400,000, 450,000 in these counties,
05:04:28 2 you've suddenly got, for each pill you're pumping in, an
05:04:32 3 extra death, or .eighths of an extra death per year.

05:04:37 4 So you can look at Walmart, who's pumping in multiple
05:04:40 5 pills per capita, you can look at Walgreens, who's pumping
05:04:45 6 in multiple pills per capita, you can look at CVS, who's
05:04:49 7 pumping in multiple pills per capita, and you can figure
05:04:53 8 that proportionally they're responsible for deaths.

05:04:57 9 Now, His Honor gave us options on how to pursue our
05:05:02 10 case, and we chose to pursue our case on an overall
05:05:09 11 oversupply of prescriptions. But that doesn't mean that we
05:05:14 12 weren't able to nitpick and we weren't able to look at
05:05:17 13 prescriptions, because we did. But you don't have to get to
05:05:22 14 the prescription level to figure out that oversupply equals
05:05:26 15 problems.

05:05:28 16 Here's your finale road map (indicating). We got to
05:05:31 17 get down the road quick. We started with the bridge.
05:05:34 18 Whoops. There we go.

05:05:36 19 We started with the bridge. I want to talk about some
05:05:39 20 Walmart arguments, some CVS arguments, and then some
05:05:43 21 Walgreens arrangements. And you're just going to have to
05:05:45 22 bear with me. I'm going to go very fast, but y'all have
05:05:48 23 been taking vicious notes, some of you. Some of you don't
05:05:52 24 take any notes at all. And I think some days I don't take
05:05:55 25 notes, but some days I take vicious notes. Today I took

Closing in Rebuttal by Plaintiffs - Lanier

05:05:58 1 vicious notes so I'm going to give you what I got but I'm
05:06:02 2 going to need you to go back there with what you've got and
05:06:04 3 you got to help everybody remember the testimony. Some
05:06:06 4 people do it better with notes, some people do it better
05:06:09 5 without notes. But talking about Walmart, here we go.

05:06:11 6 Contrast to independent dispensing level. Again, even
05:06:16 7 though I pointed this out to them in the trial, they ignored
05:06:19 8 everything I said about all of their other pharmacies that
05:06:22 9 surround these counties that pump into these counties and
05:06:27 10 they don't count any of those stores. And that's just
05:06:32 11 elusive. That's not fair to do.

05:06:34 12 MR. MAJORAS: Objection, Your Honor.

05:06:34 13 MR. LANIER: And no, MMEs is not the test.

05:06:39 14 THE COURT: Overruled.

05:06:39 15 MR. LANIER: I'm sorry, was something said?

05:06:40 16 THE COURT: I overruled the objection.

05:06:42 17 MR. LANIER: Oh, MMEs is not what they ought
05:06:44 18 to be looking at. Look this doesn't say per MME. This says
05:06:47 19 a one-pill increase in per capita. That's what the academic
05:06:51 20 look is here in this article on drug and alcohol -- out of
05:06:54 21 drug and alcohol dependence on opioid distribution in county
05:06:58 22 levels. And that's what they ought to be looking at, and
05:07:00 23 that's what we've given you.

05:07:01 24 An then, when he's talking about his bridge, he starts
05:07:05 25 playing hide-and-seek with you. He says, look, do you

Closing in Rebuttal by Plaintiffs - Lanier

05:07:08 1 realize what happened here? Here's some hide-and-seek.
05:07:11 2 Where was testimony about the county, McCann didn't talk
05:07:15 3 about county prescriptions. Well, he can't. He's not
05:07:18 4 qualified to. He's a numbers geek.

05:07:21 5 Lembke didn't talk about them. That's not her job
05:07:24 6 either. We didn't hire her to do it.

05:07:26 7 Joe Rann, Alexander, Keyes, none of them talked about
05:07:31 8 it because it wasn't their job to. That's hide-and-seek.

05:07:34 9 That's like in this trial, I didn't talk about
05:07:37 10 Johnson & Johnson's hip implants. Okay. Well, that's not
05:07:42 11 what I was hired to do here in this case. I'm in here
05:07:46 12 representing these counties.

05:07:49 13 And then he said, now, they did have Carmen Catizone
05:07:54 14 look at it and we'll talk about that later, and that later
05:07:57 15 never really showed up about what the counties said.

05:08:01 16 So what do we have? We have Carmen Catizone looking
05:08:05 17 at them and then, the next thing that I hear from him, from
05:08:10 18 Mr. Majoras, is a massive misstatement of the law.

05:08:15 19 So one of the greatest tools you've got when you go
05:08:17 20 back into the court -- into the deliberation, wherever you
05:08:21 21 will, is what the judge gives you. Read the instructions.
05:08:25 22 He's a lawyer, but he's the only lawyer that's got full
05:08:28 23 credibility in this entire room. And what he says is the
05:08:32 24 law.

05:08:36 25 And you read what he says because he doesn't say

Closing in Rebuttal by Plaintiffs - Lanier

1 things like egregious. I heard from Mr. Delinsky five
2 times, egregious, egregious, egregious. Egregious ain't
3 anywhere in there.

4 Mr. Majoras said this -- this was a stunning new one
5 for me. He said -- he put this up here, this part of the
6 charge on public nuisance. And it says that -- "Let me
7 define for you the legal term 'public nuisance.' A public
8 nuisance is an unreasonable interference with a right held
9 by the public in common that's ongoing today." And
10 Mr. Majoras wants to try and turn this into a comment that
11 the interference is ongoing today. But that's not what this
12 is talking about. This is talking about a public nuisance
13 is an unreasonable interference with a right held by the
14 public in common that is ongoing today. The public nuisance
15 has to be ongoing today.

16 In other words, if everything went wrong the way it
17 did in the first phase in 2000 to 2010, if that's resolved
18 itself and there's no longer a problem here today, God bless
19 America and Northeastern Ohio, we go home. But if the
20 public nuisance was one that's still a problem today because
21 you're still having to deal with the children that were born
22 under those circumstances and the babies, and you've still
23 got to deal with the broken families, and you've still got
24 to deal with the people in jail, and you've still got to
25 deal with the crime, and you've still got to deal with the

Closing in Rebuttal by Plaintiffs - Lanier

05:10:13 1 gateway effect, and you've still got to deal with all -- if
05:10:16 2 the nuisance is ongoing today, boom. Yet for some reason he
05:10:22 3 misreads the law to you. You can read that law when you get
05:10:25 4 back there. You'll know what it says.

05:10:27 5 I don't have time to go through everything, but I will
05:10:32 6 add one more thing to what he said here.

05:10:34 7 I've used 10 minutes. Okay. Thank you, Rachel.

05:10:36 8 They talk about Edwards, Trey Edwards, the county --
05:10:42 9 the fellow with the Ohio board, and they don't show you this
05:10:46 10 part of his testimony.

05:10:47 11 "Isn't it true you regularly advise pharmacists if you
05:10:52 12 don't write it down, it didn't happen?"

05:10:55 13 Yep. "That's common, yes."

05:10:59 14 Because what he said -- the question he played you, or
05:11:03 15 showed you was one that says just because they didn't write
05:11:06 16 it down doesn't mean they didn't do it; correct? Well,
05:11:09 17 correct. I mean, I'd say correct to that. But it doesn't
05:11:12 18 mean they did do it.

05:11:16 19 They're not writing this stuff down and maybe they are
05:11:19 20 doing it, maybe they're not, but we know they're not doing
05:11:23 21 their job right because the standard of care for Ohio and
05:11:25 22 the standard of care within the companies is document. And
05:11:30 23 if it's not documented, it didn't happen.

05:11:33 24 And as for his cut-and-paste with Trey Edwards, while
05:11:37 25 we're on the subject of Trey Edwards, he gave you this

Closing in Rebuttal by Plaintiffs - Lanier

05:11:41 1 slide -- gave you this slide just now and said look how
05:11:44 2 close Brad Nelson is to Trey Edwards.

05:11:47 3 Oh, there's a huge difference. You'll see Plaintiffs'
05:11:50 4 Exhibit 8068 when you go back there. Here's the
05:11:53 5 cut-and-paste that Brad Nelson was fond of doing because
05:11:56 6 it's got the cut-and-paste on it. Follows an e-mail like
05:11:59 7 this. This is a topic -- this is the subject, "DEA and
05:12:07 8 Dr. Cocktails."

05:12:07 9 "This is a topic I think we need to start talking
05:12:10 10 about since it could result in hefty fines for our company
05:12:14 11 and for us personally. I've heard, over the last few weeks,
05:12:19 12 that Kroger and Walgreens have started blocking doctors that
05:12:22 13 write excessively for certain meds, especially when
05:12:26 14 prescribed in conjunction with each other. I spoke with a
05:12:29 15 Kroger pharmacist this morning and he mentioned that as of
05:12:32 16 October 1st the DEA was going after pharmacies and
05:12:35 17 pharmacists that continue to fill from these doctors that
05:12:38 18 prescribe them excessively. What their definition of
05:12:42 19 excessive is, I'm not sure, but the Kroger pharmacist
05:12:46 20 mentioned that their home office determined who to block and
05:12:49 21 then blocked the pharmacies by installing a hard halt when
05:12:53 22 they tried to fill it. This was in response to the DEA's
05:12:57 23 threatening" -- and we're not allowed to know what that
05:13:01 24 says -- "to their company if they continued. So far they've
05:13:05 25 blocked four doctors in this area, Dr. Randall Wade being

Closing in Rebuttal by Plaintiffs - Lanier

05:13:08 1 one of them, he mentioned two in the Denton area, I'm not
05:13:11 2 sure of the others. We hear Dr. Wade's telling his patients
05:13:15 3 to go to Walmart because they'll still fill them, so he
05:13:18 4 knows about the block from the other stores. My concern now
05:13:22 5 is that we as a company will start to accumulate this
05:13:25 6 suspect clientele and be in the same boat as Kroger and
05:13:30 7 Walgreens that are now trying to. . .

05:13:32 8 "As you know, some of these doctors have been around
05:13:35 9 for a long time. It might be hard to dispute or prove
05:13:38 10 against the proper patient prescriber relationship, as
05:13:42 11 you'll always get a confirmation. At this point, nothing
05:13:44 12 seems excessive or out of the ordinary, but I can see a
05:13:48 13 future on this one." So do we or don't we? And the answer,
05:13:52 14 cut-and-paste. We are not allowed to corporate block. We
05:13:57 15 tried to chase that down and it was hearsay.

05:14:00 16 Nothing in writing, and certainly nothing in Ohio.

05:14:03 17 And so you've got a situation with Walmart where I
05:14:07 18 trust you've got the timelines, I trust you can look at
05:14:10 19 these timelines and see what all was happening and when they
05:14:13 20 were a funnel, and when they had their agreements with the
05:14:16 21 DEA, and how long they lived up to those agreements with the
05:14:19 22 DEA, and how they made their changes and their adjustments,
05:14:23 23 and how it was too little too a little and how even
05:14:28 24 Susanne Hiland said on OARRS, in 2007, after OARRS has come
05:14:32 25 out, the next year -- it came out in 2006 -- "There are

Closing in Rebuttal by Plaintiffs - Lanier

05:14:34 1 several states that allow access to the monitoring program.
05:14:38 2 We met with several operators, including Ron. It was
05:14:45 3 decided we'd get a legal determination of whether or not to
05:14:46 4 provide or allow this access to our stores includes Ohio.
05:14:48 5 The opinion has been we will not grant access to these
05:14:52 6 databases."

05:14:53 7 Pharmacists aren't required to use it, why should we
05:14:56 8 give it to them?

05:14:57 9 And then once the requirement came in in 2011, they
05:15:01 10 changed.

05:15:02 11 I've got to move on. Thank you, Rachel.

05:15:04 12 Let's move down the road -- thank you -- to CVS.

05:15:08 13 Now, Mr. Delinsky is generally a slow talker. But he
05:15:17 14 covered a lot of ground today. I want you to know that you
05:15:20 15 need to ignore what he said about the law and instead follow
05:15:25 16 what the judge said. Mr. Delinsky said, did CVS and its
05:15:29 17 pharmacies in Lake and Trumbull County act so egregiously as
05:15:33 18 to harm entire communities? That's not the judge's
05:15:35 19 instruction.

05:15:36 20 He said the Ohio Board of Pharmacy has all the data.

05:15:40 21 No, they don't.

05:15:42 22 He said there's never been any eyewitnesses to any
05:15:46 23 prescription problems or anything like that. Where is a
05:15:50 24 local witness?

05:15:51 25 Captain Villanueva.

Closing in Rebuttal by Plaintiffs - Lanier

05:15:54 1 Now, I wasn't able to show you the entire OARRS
05:15:56 2 report, but I was able to show you the synopsis of that
05:15:59 3 report for Doug Winland, who is convicted, not simply of
05:16:05 4 deceiving, but even beyond that. But he's clearly a
05:16:09 5 diverter. It was clear in the OARRS report, and he's
05:16:13 6 getting his prescriptions filled by CVS and Walgreens.

05:16:20 7 I mean, that's -- that's as direct as you're going to
05:16:23 8 get.

05:16:26 9 He said, no county investigation.

05:16:29 10 Well, first of all, ongoing investigations I don't
05:16:32 11 even know that I'd be allowed to get into. But what we did
05:16:35 12 with our time that we had in this case is we drove home the
05:16:39 13 bigger picture. And if we dealt with investigation by
05:16:43 14 investigation, I can guarantee you what they'd have done is
05:16:46 15 come in here and say, well, okay, that's five
05:16:49 16 investigations, that's seven suicides, so that's this, but
05:16:52 17 where's the bigger picture? And so we opted to go with the
05:16:55 18 bigger picture in the time zone. But you did see with
05:16:58 19 Doug Winland, one of the specific cases, one of the specific
05:17:01 20 investigations in this county. You saw him having his
05:17:04 21 prescriptions filled at CVS. You saw him at Franklin. You
05:17:08 22 saw him at Overholt's. You saw him at Rite Aid, and
05:17:12 23 Walgreens, Walgreens, Walgreens. Walgreens.

05:17:17 24 UNIDENTIFIED SPEAKER: Walmart.

05:17:18 25 MR. LANIER: Walmart. Last one's Walmart.

Closing in Rebuttal by Plaintiffs - Lanier

05:17:18 1 Thank you.

05:17:19 2 You saw it. The rest of the OARRS report had all of
05:17:24 3 the prescriptions and I didn't have that data to give you,
05:17:27 4 but I have this data to give you, the summation the judge
05:17:31 5 let us get into evidence and there it was.

05:17:33 6 So -- you know, and then the idea, well, but if there
05:17:40 7 was -- the company -- if the companies were doing something
05:17:43 8 wrong, surely the law enforcement would get them. But even
05:17:48 9 Ms. Militello testified -- even Ms. Militello testified --
05:18:02 10 say it again, what?

05:18:04 11 UNIDENTIFIED SPEAKER: Turn it off and on.

05:18:06 12 MR. LANIER: Off and on.

05:18:09 13 Even -- look at that. I'm telling you, Marines do it
05:18:14 14 right.

05:18:14 15 "How would you describe your interaction with law
05:18:18 16 enforcement officials in Lake County?"

05:18:19 17 "As far as Lake Narcotics, I thought it was great. I
05:18:22 18 mean, we had a really good relation with them, we always
05:18:25 19 felt like, you know, they would address things pretty
05:18:28 20 promptly to the point, and then I think they got overrun."

05:18:32 21 They don't -- they don't investigate the pharmacies
05:18:36 22 unless they get a tip.

05:18:38 23 You had the guy with the shades, Pavlich, thank you,
05:18:42 24 you had Pavlich who was rightfully proud for shutting down
05:18:50 25 Overholt's, but he never picked up on Overholt's by doing

Closing in Rebuttal by Plaintiffs - Lanier

his annual inspection. It took a tip.

I would -- I would think that there's a good chance -- I don't know what the future holds. That's not our question. Our question is simply this case right now. And so when you look at the blame game, don't look at -- yeah, look all the over the place. I have no trouble with that. The question is, how can these pharmacies blame Overholt's and how can they blame Franklin and take zero responsibility themselves? Zero.

How can they have policy -- oh, look, we had all of those wonderful policies. As Mr. Delinsky said, are we -- with all of these policies, are we the kind of company that would ever do something so egregious? And look, yes.

Holiday. That was your company.

Maryland. That was your company.

Walgreens in San Diego, that was your company.

Walmart, that was your company.

They've entered into settlement after settlement in spite of all of these wonderful policies they tell you they've got. They still -- you know, you can take every one of those wonderful screens -- Juan, this is because I bragged on this iTiVo medicine. We need a new one.

You can take all of these wonderful tools and it didn't stop *Holiday*. And it didn't stop the doctors in this case that are bad-prescribing doctors.

Closing in Rebuttal by Plaintiffs - Lanier

05:20:34 1 And they say, well, but *Holiday* didn't apply to us.

05:20:38 2 Oh, the *Holiday* settlement wasn't just two stores.

05:20:40 3 You'll see it as Plaintiffs' 8954. But it's not just those
05:20:44 4 two stores. It affected their policies, period. This was
05:20:50 5 something where the company had to deal with it. They
05:20:53 6 created a new job for it.

05:20:59 7 You know, I would -- I've got to move on. I can't
05:21:04 8 move on. I've used 20 minutes. Okay. I don't want to
05:21:07 9 shortchange Walgreens. They get a full share. But before I
05:21:12 10 leave Mr. Delinsky and CVS, I want to show you his hocus
05:21:16 11 pocus math.

05:21:19 12 Look at this.

05:21:20 13 He says we use MMEs. Never mind that the data or the
05:21:27 14 article, for example, that shows the increased deaths that
05:21:29 15 happened based upon pills, never mind that. We still want
05:21:34 16 to use MMEs. And he says, but it really doesn't matter.
05:21:38 17 And I'm sitting -- he says, if you have any question, go
05:21:41 18 back and look at this chart, so Rachel grabbed the chart, or
05:21:46 19 Ms. Fitzpatrick did back there, grabbed the chart that he
05:21:49 20 said this is what it comes from. He's showing MMEs so he
05:21:53 21 can get that 10.4 percent on the chart.

05:21:59 22 Whoops. Hold on. Hold on. Hold on.

05:22:01 23 That 10.4 percent. He's not showing you dosage units
05:22:06 24 where, all of a sudden, it's 40 percent more. It's
05:22:13 25 14 percent. That's 40 percent more than 10 percent.

Closing in Rebuttal by Plaintiffs - Lanier

05:22:19 1 But he doesn't want to show that because you increase
05:22:23 2 that and all of a sudden it looks worse.

05:22:25 3 You know, look at this. He put this one up there
05:22:28 4 (indicating).

05:22:30 5 Flagged prescribers, 37 percent. He says there must
05:22:34 6 be a problem there because 99 percent of the doctors are
05:22:36 7 perfect.

05:22:36 8 There's not a problem. The red flags happen
05:22:41 9 37 percent of the time, so you resolve them.

05:22:44 10 This is the metal detector analogy I gave you from
05:22:49 11 downstairs. Maybe 37 percent of the people trip the metal
05:22:52 12 detector. That does not mean 37 percent are trying to get a
05:22:56 13 knife in here because they're upset with the way the judge
05:22:59 14 sentenced their cousin.

05:23:02 15 Maybe 1 percent is. Maybe .1 percent is. I don't
05:23:06 16 know. But I sure hope those CSOs downstairs are checking
05:23:10 17 everybody that goes through and if the 37 percent trip it,
05:23:13 18 they say, it might be your shoes, ma'am, it might be your
05:23:16 19 belt buckle, sir. Do you have your cell phone in your
05:23:18 20 pocket? Can you take your watch off and run back through?
05:23:25 21 That's just -- I mean, that's common sense.

05:23:29 22 Let's look at Walgreens. Last stop.

05:23:34 23 Walgreens talked to you about a lot of different
05:23:40 24 stuff, the causation, things like that, and I don't have a
05:23:42 25 lot of time to get into it but I've covered it with the

Closing in Rebuttal by Plaintiffs - Lanier

05:23:44 1 others, but there are a couple of things I want to add.

05:23:46 2 They said there's no problem filling with Dr. Veres.
05:23:49 3 We filled for Dr. Veres even though others didn't, even
05:23:52 4 though others quit because he had a license. Well, poeey on
05:23:56 5 that.

05:23:57 6 Look at the background work CVS did on Dr. Veres and
05:24:02 7 ask yourself if maybe Walgreens should have done some of
05:24:05 8 this background work.

05:24:07 9 This is Plaintiffs' 8494. And it looks at the Google
05:24:11 10 reviews. And this is what the Google reviews said.

05:24:14 11 Now, may be true, may not be true. But at least
05:24:17 12 they'd have been on notice if they'd have looked and they
05:24:22 13 could have investigated to see if it's true. I've learned
05:24:25 14 Google reviews are not always true.

05:24:26 15 Here it is. January 25th, 2016. "My mother's a
05:24:30 16 patient of his and she literally walks around like a zombie.
05:24:35 17 She's been hospitalized multiple times with falls and for
05:24:37 18 being over-medicated. So instead of lowering her dosages,
05:24:42 19 he doubled them. There's no way he could actually be her
05:24:45 20 doctor and not realize what's going on. Everybody in town
05:24:48 21 who's hooked on pain and anxiety meds are his patients. So
05:24:52 22 if you want to become a full-blown drug addict, he's the man
05:24:54 23 to see."

05:24:56 24 I mean, do they check this stuff? No. Their answer
05:25:01 25 to you is, hey, he had a valid DEA license. We'll be the

Closing in Rebuttal by Plaintiffs - Lanier

05:25:08 1 gumball machines, spit it out. We're not going to do any
05:25:13 2 work. And that's absolutely horrible.

05:25:14 3 Look at the red flags that are here according to CVS's
05:25:17 4 investigation. CVS investigates and says, hydrocodone, he's
05:25:22 5 volume 99. He's in the top 99 percentile. His share is 98.
05:25:28 6 Average red flags, he's in the 97th percentile. Cocktails,
05:25:33 7 the 95th percentile. 26 percent with any benzo, and then he
05:25:39 8 prefers Valium.

05:25:40 9 Now, there's no board action on file, but come on.
05:25:48 10 But Walgreens' attitude was, hey, he's got a valid license,
05:25:52 11 we'll just fill those, we're not too worried about it.

05:25:55 12 You look at Joyce, even Joyce admitted, question by
05:26:00 13 Mr. Weinberger: "You remember Dr. Veres, don't you?"

05:26:03 14 "Very well."

05:26:04 15 "What do you remember about him?"

05:26:06 16 "Dr. Veres has been a problem in the valley for a long
05:26:12 17 time."

05:26:12 18 That's Dr. Veres.

05:26:14 19 Rachel, how much time do I have?

05:26:19 20 MS. LANIER: 5 minutes.

05:26:20 21 MR. LANIER: 5 minutes.

05:26:21 22 He said there's no evidence that the Walgreens'
05:26:24 23 pharmacists failed do their job. Sitting their thinking,
05:26:27 24 were you gone whether Carmen Catizone put the prescriptions
05:26:30 25 up there? Did you not see 508 days of oxy? And this is one

Closing in Rebuttal by Plaintiffs - Lanier

1 that was filled. This note was entered and then the
2 pharmacist filled it. Did you not see how many were blank,
3 the relevant note fields? Did you not see the other
4 prescriptions that were especially bad? Did you not see
5 what Tasha Polster had to say? This on the question of
6 intent. Someone says, well, intent is something you've got
7 to show. Yeah, the way the judge specifies it. And so you
8 look at that charge, and you look at things that include
9 stuff like Page 19 down at the bottom. Page 19 down at the
10 bottom says something significant.

11 If you will find it for me, please, Peter.

12 Meanwhile, I will tell you that these are the
13 people -- uh, 19. He's fast, man. It's his birthday.

14 Don't let anybody say someone 71 can't move quick,
15 Your Honor.

16 If a person learns that circumstances resulting from
17 their conduct interfere with public health or safety and the
18 person continues that conduct, the subsequent conduct is
19 intentional. These companies knew what they were doing.
20 Florida put them on notice. *Holiday* put them on notice.
21 Maryland put them on notice. They knew their systems
22 weren't working, and yet they just kept with it. They just
23 kept with them. They'd make adjustments years later, but
24 they just kept with them.

25 You've got the documents from people like

Closing in Rebuttal by Plaintiffs - Lanier

05:28:07 1 Tasha Polster who recognized that there's a problem with
05:28:10 2 training, and she recognizes periodic training for all
05:28:14 3 retail employees for dispensing. No such training exists
05:28:18 4 today. This is 2010.

05:28:21 5 They recognized that, you know, they say, well, you
05:28:24 6 know, we had Good Faith Dispensing. No, that's something
05:28:27 7 you relaunched in 2013, in June. We relaunched our Good
05:28:34 8 Faith Dispensing Policy across the chain.

05:28:35 9 And then they monitored to see how it was doing, and
05:28:39 10 their per store random check was going south. Results were
05:28:44 11 unfavorable because they weren't doing a good job.

05:28:48 12 So you get the jury instructions. You get the verdict
05:28:53 13 forms. And this is what they look like when the judge gives
05:28:56 14 them to you (indicating).

05:29:00 15 Did Lake County prove, by the greater weight of the
05:29:03 16 evidence, that oversupply of legal prescription opioids --
05:29:06 17 see, it's not a prescription-by-prescription analysis. This
05:29:11 18 is oversupply -- and diversion of those opioids into the
05:29:15 19 illicit market outside of appropriate medical channels, is a
05:29:18 20 public nuisance?

05:29:19 21 They can trash the gateway theory all they want to,
05:29:22 22 but they didn't bring one single doctor or scientist to
05:29:26 23 address it. Not one.

05:29:31 24 I think your answer to this should be yes, and I hope
05:29:39 25 that you see it the same way and those who -- if there's

Closing in Rebuttal by Plaintiffs - Lanier

05:29:43 1 some that don't see it that way, please, those of you who
05:29:47 2 do, I want you to not beat them up, but really go after
05:29:51 3 them. No, I'm joking.

05:29:52 4 You've got to debate this, though. You've got to come
05:29:55 5 up with the right answer, and it takes all of you to do it.
05:29:58 6 And if you don't agree with me on this stuff, that's fine,
05:30:00 7 you voice your opinion and y'all will figure it out. But
05:30:02 8 this is extremely serious. And if you answer no, then
05:30:06 9 you've got to look at it for Trumbull County, it's the same
05:30:08 10 question, if you answer no to both, then the case is over.

05:30:12 11 But if you answer yes, then you've got to answer a
05:30:14 12 second question for each county, and that is, did we prove
05:30:18 13 that any of the following defendants engaged in intentional
05:30:21 14 and/or illegal conduct? Read the charge. It's your anchor
05:30:26 15 on what intentional is and what illegal is.

05:30:29 16 Remember the standard of care they have to live up to,
05:30:33 17 which was a substantial factor. I'm telling you, if they
05:30:37 18 put out an extra pill, that's one-fifth of a person dead if
05:30:41 19 it's a per capita pill. It's got to be per capita for the
05:30:45 20 whole county -- in producing the nuisance. And I hope that
05:30:49 21 you will see to answer yes on that for each of the
05:30:52 22 defendants.

05:30:53 23 This is almost like the Target Drug Good Faith
05:30:59 24 Dispensing checklist. You just need to say, yes, yes, yes,
05:31:01 25 yes, yes, if that's indeed the way you see the evidence, and

Conclusion of Charge to the Jury

05:31:04 1 I hope it is.

05:31:04 2 So, I'm done. My job was to give you evidence and get
05:31:08 3 to the truth.

05:31:12 4 My job was to do it within the rules and to do it
05:31:15 5 fairly and try to keep you from getting too bored along the
05:31:24 6 way. And I don't know if I've done anything that's
05:31:26 7 offensive, just set that aside because this is about
05:31:29 8 something much bigger than me. This is about something much
05:31:31 9 bigger.

05:31:32 10 And so I just hope and pray that this is something
05:31:34 11 where you're comfortable going back and doing what you need
05:31:37 12 do to figure this out, because the burden is now off of us
05:31:42 13 and it's entirely on y'all. But we got all the faith and
05:31:46 14 confidence in the world in you, what you will and can do.

05:31:49 15 So I want to look each of you in the eye and say thank
05:31:54 16 you. Thank you, thank you, thank you, thank you, thank
05:31:58 17 you -- still can't believe you ran so much faster than me,
05:32:04 18 it's not even funny -- thank you, thank you. We had
05:32:08 19 Veterans Day while you were here. Thank you for that as
05:32:10 20 well. Thank you, thank you, thank you, and thank you very,
05:32:14 21 very much.

05:32:15 22 You guys have been outstanding, and I think I'm saying
05:32:18 23 that on behalf of all of the lawyers in here and all of the
05:32:20 24 clients in here.

05:32:22 25 So God bless you all.

Conclusion of Charge to the Jury

05:32:25 1 Thank you, Your Honor.

05:32:29 2 CONCLUSION OF CHARGE TO THE JURY

05:32:29 3 THE COURT: All right. Thank you, Mr. Lanier.

05:32:30 4 So, ladies and gentlemen, I just have a few minutes
05:32:32 5 left. Those of you who were following along, I'm going to
05:32:37 6 pick up reading my final instructions on Page 28.

05:32:44 7 That concludes the part of my instructions explaining
05:32:49 8 the rules --

05:32:50 9 MR. STOFFELMAYR: I'm sorry. There's
05:32:50 10 something on the -- oh, it's gone now. I apologize. There
05:32:53 11 was something on the screen.

05:32:54 12 THE COURT: All right. Now let me finish up
05:32:56 13 by explaining some things about your deliberations in the
05:32:58 14 jury room: The first thing that you should do in the jury
05:33:03 15 room is choose someone to be your foreperson. This person
05:33:05 16 will help to guide your discussions and will be your
05:33:08 17 spokesperson for you here in court.

05:33:11 18 Once you are start deliberating, do not talk to the
05:33:14 19 courtroom deputy or to me or to anyone else about the case.
05:33:18 20 We must communicate in writing. Write down your message,
05:33:21 21 have the foreperson sign it, and then give it to the
05:33:23 22 courtroom deputy. He will give it to me, and I will respond
05:33:26 23 as soon as I can. I may have to talk to the lawyers about
05:33:29 24 what you've asked, so it may take me some time to get back
05:33:32 25 to you.

Conclusion of Charge to the Jury

05:33:33 1 One more thing about messages. Do not ever write down
05:33:36 2 or tell anyone how you stand on your votes. For example, do
05:33:39 3 not write down or tell anyone that you are split 6-6, or
05:33:44 4 8-4, or whatever your vote happens to be. That should
05:33:47 5 remain secret until you are finished.

05:33:51 6 Juror notes.

05:33:52 7 Remember that if you elected to take notes during the
05:33:54 8 trial -- and I know many of you did -- your notes should be
05:33:57 9 used only as memory aids. You should not give your notes
05:34:00 10 greater weight than your independent recollection of the
05:34:02 11 evidence. You should rely upon your own independent
05:34:05 12 recollection of the evidence, or lack of evidence, and you
05:34:09 13 should not be unduly influenced by the notes of other
05:34:12 14 jurors. Notes are not entitled to any more weight than the
05:34:16 15 memory or impression of each juror.

05:34:18 16 Whether you took notes or not, each of you must form
05:34:21 17 and express your own opinion as to the facts of the case.

05:34:25 18 Remember that you must make your decision based only
05:34:33 19 on the evidence that you saw and heard here in court.

05:34:36 20 During your deliberations, as I've instructed you for
05:34:38 21 the last 6, 7 weeks, you must not communicate with or
05:34:41 22 provide any information to anyone by any means about the
05:34:45 23 case. You may not use any electronic device or media, such
05:34:49 24 as a telephone, cell phone, smartphone, iPhone, BlackBerry,
05:34:55 25 or computer, the internet, any internet service, or any text

Conclusion of Charge to the Jury

05:34:58 1 or instant messaging service, any internet chatroom, blog,
05:35:01 2 or website such as Facebook, Instagram, LinkedIn, YouTube,
05:35:08 3 or Twitter to communicate to anyone any information about
05:35:11 4 this case or to conduct any research about this case until I
05:35:15 5 accept your verdict.

05:35:17 6 In other words, you cannot talk to anyone on the
05:35:19 7 phone, correspond with anyone, or electronically communicate
05:35:22 8 with anyone about this case. You can only discuss the case
05:35:26 9 in the jury room with your fellow jurors during
05:35:29 10 deliberations. I expect you will inform me as soon as you
05:35:33 11 become aware of another juror's violation of these
05:35:36 12 instructions.

05:35:36 13 You may not use these electronic means to investigate
05:35:41 14 or communicate about the case because it is important -- it
05:35:46 15 is essential -- that you decide this case based solely on
05:35:48 16 the evidence presented in this courtroom. Information on
05:35:52 17 the internet or available through social media might be
05:35:55 18 wrong, incomplete, or inaccurate. You are only permitted to
05:35:59 19 discuss the case with your fellow jurors during
05:36:02 20 deliberations because they've seen and heard the same
05:36:05 21 evidence that you have.

05:36:07 22 In our judicial system, it is important that you are
05:36:10 23 not influenced by anyone or anyone outside of this
05:36:15 24 courtroom -- anything or anyone outside of this courtroom.
05:36:17 25 Otherwise, your decision may be based on information known

Conclusion of Charge to the Jury

05:36:20 1 only by you and not your fellow jurors or the parties in the
05:36:24 2 case. This would unfairly and adversely impact the judicial
05:36:28 3 process.

05:36:28 4 You should know that if this admonition is violated,
05:36:33 5 there could be a mistrial. A mistrial means that the case
05:36:36 6 is stopped before it is finished and must be retried at a
05:36:40 7 later date. This can lead to a great deal of expense for
05:36:44 8 the parties and the Court. No one wants to see money
05:36:47 9 wasted. If a mistrial were to be declared based on a
05:36:51 10 violation of this admonition, the juror responsible could be
05:36:54 11 required to pay the cost of the first trial and could also
05:36:57 12 be punished for contempt of court.

05:37:00 13 In summary, make your decision based only on the
05:37:02 14 evidence that you saw and heard here in court.

05:37:10 15 Unanimous verdict.

05:37:10 16 Your verdict, whether it be for a plaintiff or a
05:37:13 17 defendant, must be unanimous. This means that for you to
05:37:17 18 find for a specific plaintiff and against a specific
05:37:20 19 defendant, every one of you must agree that that specific
05:37:24 20 plaintiff has proved all the elements of its claim against
05:37:28 21 that specific defendant by a preponderance of the evidence.

05:37:31 22 Similarly, for you to find for a specific defendant
05:37:35 23 and against a specific plaintiff, every one of you must
05:37:39 24 agree that that specific plaintiff has failed to prove all
05:37:42 25 the elements of its claim against that specific defendant by

Conclusion of Charge to the Jury

05:37:45 1 a preponderance of the evidence.

05:37:47 2 Either way, your verdict must be unanimous.

05:37:49 3 When you enter the jury room following the arguments,
05:37:55 4 you are free to talk about the case. In fact, it is now
05:37:58 5 your duty to talk with each other about the evidence and to
05:38:00 6 make every reasonable effort you can to reach unanimous
05:38:04 7 agreement. Talk with each other, listen carefully and
05:38:07 8 respectfully to each other's views, and keep an open mind as
05:38:12 9 you listen to what your fellow jurors have to say. Try your
05:38:15 10 best to work out your differences. Do not hesitate to
05:38:18 11 change your mind if you are convinced that other jurors are
05:38:21 12 right and you are wrong.

05:38:22 13 But do not ever change your mind just because other
05:38:25 14 jurors see things differently, or just to get the case over
05:38:29 15 with. In the end, your vote must be exactly that, your own
05:38:34 16 vote. It is important for you to reach unanimous agreement,
05:38:37 17 but only if you can do so honestly and in good conscience.

05:38:41 18 No one will be allowed to hear your discussions in the
05:38:44 19 jury room, and no record will be made of what you say. So
05:38:49 20 you should all feel free to speak your minds.

05:38:51 21 Listen carefully to what everyone else has to say, and
05:38:54 22 then decide for yourself if the plaintiffs have proved its
05:38:59 23 claims or their claims by a preponderance of the evidence.
05:39:01 24 Your sole interest is to seek the truth from the evidence in
05:39:04 25 the case.

Conclusion of Charge to the Jury

05:39:05 1 Now, the lawyers have talked about the verdict forms.
05:39:09 2 Mr. Pitts will give them to you. They're very simple.
05:39:14 3 They're identical forms, one for Lake County and one for
05:39:16 4 Trumbull County. And you've got the same questions for each
05:39:22 5 county.

05:39:23 6 Did Lake County prove, by the greater weight of the
05:39:25 7 evidence, that oversupply of legal prescription opioids and
05:39:29 8 diversion of these -- those opioids into the illicit market
05:39:33 9 outside of appropriate medical channels is a public nuisance
05:39:38 10 in Lake County?

05:39:39 11 You circle yes or no, and then everyone signs.

05:39:43 12 If you answer yes to Question 1, then you go to
05:39:47 13 Question 2, and then you have to decide if Lake County
05:39:51 14 proved, by the greater weight of the evidence, that any of
05:39:54 15 the following defendants engaged in intentional and/or
05:39:58 16 illegal conduct which was a substantial factor in producing
05:40:01 17 the public nuisance that you found exists in Question 1.

05:40:05 18 And then there is simply yes or no for each of the
05:40:09 19 three defendants. You -- as I've instructed you, you must
05:40:12 20 consider the evidence against each different separately, and
05:40:14 21 then you vote separately on each defendant, CVS, Walgreens,
05:40:19 22 and Walmart, and each of you sign.

05:40:22 23 And then there are exactly identical forms for
05:40:27 24 Trumbull County.

05:40:28 25 Of course, if you answer no to Question No. 1, you're

Conclusion of Charge to the Jury

05:40:32 1 done as to Lake County and you go to question -- to the
05:40:36 2 verdict forms for Trumbull County and do the same thing.

05:40:41 3 So you will take the verdict forms to the jury room,
05:40:44 4 and when you have reached unanimous agreement as to your
05:40:46 5 verdict, you will have your foreperson fill in each answer,
05:40:51 6 sign his or her name, date the form in the bottom right-hand
05:40:54 7 corner, and then the rest of you all sign.

05:40:58 8 Please complete these documents in ink.

05:41:05 9 Unless all of you agree, you may not return an answer
05:41:05 10 to any question. After you have all signed the appropriate
05:41:08 11 documents, ring the jury buzzer -- or actually you -- here,
05:41:11 12 there may be a phone number you give because, again,
05:41:15 13 Judge Gwin has graciously allowed you to use -- all of us it
05:41:19 14 use his courtroom. So when you notify us, we'll reconvene
05:41:24 15 the parties and counsel.

05:41:25 16 All right. Each of you has a copy of these
05:41:32 17 instructions with you in the jury room for your assistance
05:41:34 18 during your deliberations, and these instructions should
05:41:37 19 answer any question that you have. However, if during your
05:41:39 20 deliberations you should desire to communicate with the
05:41:41 21 Court, please reduce your message or question in writing,
05:41:46 22 signed by your foreperson, and pass the note to the
05:41:49 23 courtroom deputy, or one of my staff, who will bring it to
05:41:52 24 my attention. I will then respond as promptly as possible,
05:41:56 25 either in writing or by having you return to the courtroom

Conclusion of Charge to the Jury

05:41:59 1 so that I can address you orally.

05:42:01 2 Remember at all times, you are not partisans. You are
05:42:06 3 judges - judges of the facts. Your sole interest is to seek
05:42:09 4 the truth from the evidence in the case.

05:42:13 5 Let me finish up by repeating something that I said to
05:42:19 6 you earlier. Nothing that I have said or done during this
05:42:21 7 trial was meant to influence your decision in any way.
05:42:24 8 Nothing said in these instructions is meant to suggest or
05:42:28 9 convey in any way what verdict I think you should find.
05:42:32 10 What the verdict shall be is the sole and exclusive duty and
05:42:37 11 responsibility of the jury. You shall decide for yourselves
05:42:40 12 if either plaintiff has proved by a preponderance of the
05:42:44 13 evidence its claim against each of the defendants.

05:42:50 14 And now I have to do something somewhat unpleasant.
05:42:54 15 The rules of court require that a civil jury cannot be more
05:42:58 16 than 12 people. You recall, we started with 14. It's my
05:43:05 17 experience -- I don't think I've ever had a trial of this
05:43:07 18 length where we didn't lose one, two, or more jurors because
05:43:12 19 of illness, family emergencies, whatever. We lost one juror
05:43:21 20 for something unfortunate, but not for illness. The rest of
05:43:25 21 you, the 13 of you, have been here every single day no
05:43:28 22 matter what was happening in your lives, and you have our
05:43:30 23 utmost thanks and respect. But there are 13 of you. So
05:43:33 24 what I must need do now is excuse Juror 13.

05:43:38 25 Yes, sir, and I -- now, if I could rewrite the rules

Conclusion of Charge to the Jury

05:43:41 1 and say it's juries of 13, I would, but I don't write those
05:43:45 2 rules, Congress does. So you are excused with my -- our
05:43:50 3 thanks.

05:43:51 4 One thing, I would request that you continue to follow
05:43:55 5 the admonition until we notify you that the jury has reached
05:43:59 6 a verdict. So that means you're not do any research or
05:44:04 7 Googling or checking, and you're not to talk to anyone else
05:44:07 8 about the trial. We will notify you when the jury reaches a
05:44:10 9 verdict.

05:44:10 10 So, sir, thank you, you may be excused now.

05:44:15 11 All right. At this point, I'm going to ask Mr. Pitts
05:44:20 12 to take the jurors over to Judge Gwin's courtroom and he'll
05:44:28 13 show you how you get in and out because from now on, that's
05:44:32 14 where you'll go. And Mr. Pitts also will give you the jury
05:44:37 15 verdict forms and shortly will give you, I think there are
05:44:42 16 two jump drives, one with the plaintiffs' exhibits, one with
05:44:46 17 the defendants' exhibits, and he'll show you how to access
05:44:49 18 them.

05:44:49 19 Now, up to now, I've set the schedule. I've told you
05:44:55 20 when to show up. It's generally been 9:00 a.m. I've ended
05:44:59 21 the day when I said we're done. At this point, you all set
05:45:03 22 the schedule. There's really only one rule. That means you
05:45:07 23 all follow the same schedule. So if you decide we're done
05:45:11 24 for the evening, we're done. If you say, we're going to
05:45:13 25 start tomorrow at 9 o'clock, you wait till all 12 of you are

Conclusion of Charge to the Jury

05:45:18 1 there and then you start.

05:45:21 2 So I don't know, if you want to start deliberating
05:45:23 3 today, that's fine. If you want to break for the day,
05:45:26 4 that's fine. If you want to think about it and go over into
05:45:31 5 Judge Gwin's courtroom and think about it a little, that's
05:45:35 6 fine.

05:45:36 7 I always excuse the jury personally at the end of the
05:45:40 8 day. That's just my experience, and remind you of the
05:45:43 9 admonition. I don't need to bring you in in the morning to
05:45:49 10 do that.

05:45:49 11 So. . . I guess, Mr. Pitts, if you want to take the
05:45:52 12 jury to Judge Gwin's courtroom, make sure you have
05:45:56 13 everything you need.

05:45:57 14 Thank you.

05:46:03 15 (Jury retired to the jury room to begin its deliberations
05:46:35 16 at 5:46 p.m.)

05:46:35 17 THE COURT: If someone could close the
05:46:36 18 backdoor, please.

05:46:47 19 Okay. It would not surprise me if the jury wants to
05:46:52 20 go home soon, but, again, they may not. So. . . I guess I'd
05:47:00 21 appreciate it if everyone just stick around for a little
05:47:02 22 bit. If they decide they want to leave, I'll bring them
05:47:05 23 back and excuse them for the evening. If they decide they
05:47:08 24 want to deliberate for a long time, everyone doesn't have to
05:47:10 25 stay in the courtroom. And -- or everyone, you can leave,

05:47:16 1 because actually, I don't need all the lawyers here when I
05:47:19 2 excuse them at the end of the day. I bring them in. So no
05:47:22 3 one has to stick around. If you want to, you may, but you
05:47:26 4 don't have to. Because I don't require all the lawyers to
05:47:29 5 be here at the end of the day to bring them in and I give
05:47:32 6 them the admonition.

05:47:36 7 MR. DELINSKY: Judge. . .

05:47:37 8 THE COURT: Yes.

05:47:37 9 MR. DELINSKY: Judge, do you have all our
05:47:40 10 contact information? I know Special Master Cohen collected
05:47:42 11 it at the beginning of the case, but I don't want to leave
05:47:44 12 the courtroom --

05:47:45 13 THE COURT: I've got a sheet, which I don't
05:47:47 14 think anyone's cell phones have changed.

05:47:49 15 MR. DELINSKY: Okay. Just want to
05:47:50 16 double-check, Your Honor.

05:47:51 17 THE COURT: I see we've got it. David has it.
05:47:54 18 Mr. Pitts has it. So yes, I've got it, and, obviously, if
05:47:58 19 there are questions, I assemble everyone quickly. I don't
05:48:03 20 do that without consulting everyone. And obviously a
05:48:08 21 verdict.

05:48:11 22 Okay. Well, have a good evening, everyone.

05:48:18 23 (Recess was taken at 5:48 p.m.)

05:57:20 24 THE CSO: Could you all rise for the jury?

05:57:22 25 (Jury returned to courtroom at 5:57 p.m.)

05:57:29 1 THE COURT: All right. Please be seated.

05:57:31 2 Please be seated, ladies and gentlemen.

05:57:33 3 I understood mistakenly a number have left.

05:57:38 4 So you want to break for the evening; is that
05:57:40 5 correct?

05:57:40 6 THE JURY: Yes.

05:57:40 7 THE COURT: And what time are you convening
05:57:42 8 tomorrow?

05:57:44 9 THE JURY: 9:30.

05:57:45 10 THE COURT: 9:30. Okay.

05:57:47 11 All right. It's very important that you follow all of
05:57:50 12 my admonitions.

05:57:52 13 Do not discuss this case with anyone.

05:57:54 14 Do not encounter anything in the media, print,
05:57:58 15 electronic, whatever, or anything remotely close to the
05:58:01 16 case.

05:58:02 17 Make sure you don't begin deliberating tomorrow until
05:58:07 18 everyone's present. If everyone's there a few minutes
05:58:09 19 before, you can start, but out of respect, don't start till
05:58:13 20 all 12 are there.

05:58:14 21 And, Mr. Pitts, if you would call the others and tell
05:58:17 22 them that.

05:58:18 23 COURTROOM DEPUTY: Yeah. We've already talked
05:58:20 24 about that.

05:58:20 25 THE COURT: Okay. Thanks, and have a good

05:58:22 1 evening.

05:58:26 2 (Proceedings adjourned at 5:58 p.m.)

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C E R T I F I C A T E

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I certify that the foregoing is a correct transcript
of the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

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/s/ Heather K. Newman

11-15-2021

HEATHER K. NEWMAN, RMR, CRR

DATE

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